No. 84-1135

Office-Supreme Court, U.S.
FILED
JAN 14 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE COMMISSIONER OF TRANSPORTATION OF THE STATE OF NEW YORK,
Petitioner,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT ABRAMS*
Attorney General of the
State of New York
ROBERT HERMANN
Solicitor General
PETER H. SCHIFF
Deputy Solicitor General
The Capitol
Albany, N.Y. 12224
(518) 474-8101

BRYCE REA, JR.
DONALD E. CROSS
LEO C. FRANEY
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 785-3700

Counsel for Petitioner

* Counsel of Record

Of Counsel:

REA, CROSS & AUCHINCLOSS
Suite 700
One Thomas Circle, N.W.
Washington, D.C. 20005

January 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Does the Bus Regulatory Reform Act of 1982 empower the Interstate Commerce Commission to preempt state regulation of intrastate bus rates that are lower than interstate rates without finding (1) that the lower intrastate rates unreasonably discriminate against or unreasonably burden interstate commerce and (2) what intrastate rates are the minimum necessary to remove any such discrimination or burden?

PARTIES TO THE PROCEEDING

The Commissioner of Transportation of the State of New York was the petitioner below. The National Association of Regulatory Utility Commissioners appeared as *amicus curiae* in support of petitioner. Respondents below were the United States and the Interstate Commerce Commission. Greyhound Lines, Inc., intervened in support of respondents.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
RELEVANT STATUTES	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	10
I. The Scope of the ICC's Authority to Preempt Intrastate Bus Rate Regulation Presents an Important Federal Question that Should be Decided by this Court	10
II. The Lower Court's Decision Misconstrues an Important Statute Governing Federal/State Relationships and is in Conflict with the Applicable Precedents of this Court	13
CONCLUSION	19

TABLE OF AUTHORITIES

CASES: Page

Chicago, Milwaukee, St. P. & P.R.Co. v. State of Ill., 355 U.S. 300 (1958) 16-17

Florida v. United States, 282 U.S. 194 (1931) 18

Houston, E. & W.T.R.Co. v. United States, 234 U.S. 342 (1914) 7

Petition of Virginia Stage Lines, I.C.C. Docket No. MC-59238 (Sub-No. 74), (not printed), served March 23, 1984 ..... 12, 18

Public Service Commission of Utah v. United States, 356 U.S. 421, 425-426 (1958) 14, 17, 18

Railroad Commission of Wisconsin v. Chicago, B. & Q. R.Co., 257 U.S. 563 (1922) 13

State of North Carolina v. United States, 325 U.S. 507 (1945) 14, 15, 18

STATUTES:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2350(a) 2

Interstate Commerce Act:

49 U.S.C. § 13(4) 13
49 U.S.C. § 10521(b) 6
49 U.S.C. § 10935(e)(4) 18
49 U.S.C. § 11501 13
49 U.S.C. § 11501(a) 6, 13, 14
49 U.S.C. § 11501(a)(2) 6, 13
49 U.S.C. § 11501(e) ..... *passim*
49 U.S.C. § 11501(e)(1) 14
49 U.S.C. § 11501(e)(1)(B) 6
49 U.S.C. § 11501(e)(2) 9, 10, 18

TABLE OF AUTHORITIES continued

Page

49 U.S.C. § 11501(e)(3)(A) 8
49 U.S.C. § 11501(e)(4) 14
49 U.S.C. § 11501(f) 2, 5

New York Transportation Law § 140 5-6

Code of Federal Regulations:
49 C.F.R. § 1104.3 18

MISCELLANEOUS:

S. Rep. No. 97-411, 97th Cong. 2d Sess. (1982) 16

H. Rep. No. 97-334, 97th Cong. 1st Sess. (1981) 16

Pub. L. 95-473 (1978), 92 Stat. 1466 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. ——

THE COMMISSIONER OF TRANSPORTATION OF
THE STATE OF NEW YORK,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is unreported and is set forth in Appendix A, p. 1a. The decision of the Interstate Commerce Commission is unreported and is set forth in Appendix B, p. 18a. The decision of the New York Department of Transportation is unreported and is set forth in Appendix C, p. 26a. The judgment of the Court of Appeals is set forth in Appendix D, p. 40a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1984. Upon the motion of Petitioner, the date for the filing of this petition was extended by order of Mr. Justice Thurgood Marshall until January 14, 1985. The order is set forth in Appendix E, p. 41a. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2350(a).

RELEVANT STATUTES

The relevant statute is 49 U.S.C. § 11501(e) and (f) which read as follows:

> SECTION 11501. INTERSTATE COMMERCE COMMISSION AUTHORITY OVER INTRASTATE RATES
>
> (e)(1) The Commission shall prescribe any rate, rule, or practice applicable to transportation provided entirely in one State by a motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title * * *—
>
> (A) if the carrier has requested the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice for permission to establish such rate, rule, or practice and the request has been denied (in whole or in part) or the State authority has not acted finally (in whole or in part) on the request by the 120th day after the carrier made the request; and
>
> (B) if the Commission finds that the rate, rule, or practice in effect and applicable to such intrastate transportation causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce.

(2) For purposes of paragraph (1)(B) of this subsection, there shall be a rebuttable presumption that—

(A) any rate, rule, or practice applicable to transportation provided by a motor common carrier of passengers entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds—

(i) that such rate, rule, or practice results in the carrier charging a rate for such transportation which is lower than the rate such carrier charges for comparable interstate transportation of passengers;

(ii) on the basis of evidence presented by the carrier, that as a result of such rate, rule, or practice such carrier does not receive revenues from such transportation which exceed the variable costs of providing such transportation; or

(iii) that the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice failed to act finally (in whole or in part) on the request of the carrier to establish such rate, rule, or practice by the 120th day after the date the carrier made the request; and

(B) any rate applicable to transportation entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds that the most recent general rate increase applicable to transportation provided by motor common carriers of passengers in such State is less than the mot recent general rate increase applicable to interstate transportation provided by motor common carriers of passengers under this subtitle * * *.

(3)(A) A motor common carrier of passengers must file an application with the Commission for prescription under this subsection of a rate, rule, or practice applicable to transportation provided entirely in one State by such carrier. When such application is filed with the Commission, the carrier shall certify that he has notified (i) the Governor of such State, (ii) the department, agency, or instrumentality of such State which denied, or failed to take action on, the request of such carrier related to such rate, rule, or practice, and (iii) such other interested persons as the Commission may specify by regulation. The Commission shall take final action on any such application not later than 60 days after such application is filed with the Commission.

(B) The Commission shall establish, by regulation, procedures for processing applications under this subsection.

(4) This subsection shall not apply to any carrier owned or controlled by a State or local government.

(5) No State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to scheduling of interstate or intrastate transportation provided by motor common carrier of passengers subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title * * * on an authorized interstate route or relating to the implementation of any reduction in the rates for such transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required. This para-

graph shall not apply to intrastate commuter bus operations.

(6)(A) No motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission may charge or collect a rate for intrastate service provided on an authorized interstate route which constitutes a predatory practice in contravention of the transportation policy set forth in section 10101(a) of this title * * *.

(B) When the Commission decides, upon complaint by any person, that a reduction in a rate charged or collected by such a motor common carrier of passengers for intrastate service provided on an authorized interstate route constitutes a predatory practice in contravention of the transportation policy set forth in section 10101(a) of this title * * *, the Commission shall prescribe the rate applicable to such service.

(f) The Commission may take action (1) under this section only after a full hearing, or (2) with respect to a rate, rule, or practice of a motor common carrier of passengers, in accordance with the procedures established by the Commission under subsection (e)(3)(B) of this section. Action of the Commission under this section supersedes State law or action taken under State law in conflict with the action of the Commission.

* * * * * *

STATEMENT OF THE CASE

Statutory Background

Petitioner is charged with regulating intrastate bus passenger rates in accord with the New York Trans-

portation Law, Section 140, *et seq.*, McKinney (1984). Under that law, rates must be just, reasonable, and non-discriminatory.

Until the Bus Regulatory Reform Act of 1982 became law the Interstate Commerce Commission had no regulatory authority whatever respecting intrastate transportation by motor carriers. Former 49 U.S.C. § 10521(b), 92 Stat. 1361. In contrast, the ICC had, and still has, authority to prescribe higher intrastate rates for railroads when it finds that the lower level of rates allowed by a state "causes—unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce." 49 U.S.C. § 11501(a)(2).

Section 17 of the Bus Act [codified as 49 U.S.C. § 11501(e)] gives the ICC the same authority over intrastate bus passenger rates that it has over intrastate rail rates, namely, authority to prescribe higher intrastate rates when it finds that the lower level of rates allowed by a state "causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce." 49 U.S.C. § 11501 (e)(1)(B). Insofar as pertinent here, Section 17 of the Bus Act differs from 49 U.S.C. § 11501(a) in that it creates "a rebuttable presumption" that rates impose an unreasonable burden on interstate commerce if the ICC finds that the intrastate rates are lower than the interstate rates or that the lower rates do not produce revenues in excess of the variable costs of providing the intrastate transportation.

The fundamental question in this case is whether the Congress, in creating this "rebuttable presumption," intended to overrule the body of law establishing the

standards for determining the existence *vel non* of an unreasonable burden on interstate commerce that this Court painstakingly developed case-by-case, commencing with the Shreveport Cases in 1914. *Houston, E. & W.T.R. Co.* v. *United States,* 234 U.S. 342 (1914).

The Case At Bar

On May 24, 1983, Greyhound Lines, Inc. a motor common carrier of passengers providing both intrastate and interstate transportation in the State of New York, filed with Petitioner a general increase of 40 percent in its intrastate rates. Petitioner suspended the increase and held hearings in July of 1983 on the issue of its lawfulness under the law of New York. Petitioner denied the increase on the grounds that: (1) Greyhound had been permitted to raise its intrastate rates by 64 percent since May of 1979, and had effected a 10 percent increase only one month before the proposed 40 percent increase was filed; (2) at the existing intrastate rate level Greyhound's intrastate traffic for the year ending December 31, 1983 would produce an operating ratio of 90.78 percent, i.e. a profit margin of 9.22%[1]; (3) a rate increase of 40 percent would produce a profit margin of 20 to 25 percent on intrastate traffic; (4) intrastate revenues in New York were contributing a greater share of Greyhound's profits than the revenues from the rest of Greyhound's

---

[1] The operating ratio on particular traffic is an expression of the carrier's operating expenses in handling that traffic as a percentage of its operating revenues from that traffic. The operating expenses are all expenses incurred in handling the traffic, including an aliquot share of so-called constant costs, e.g., the salary of the President of the company.

Eastern Division, which Greyhound defines as the territory east of the Mississippi River. Appendix C, p. 31a. Greyhound did not challenge the findings of profitability. Indeed, it could not because they were based on its own evidence of revenues, expenses and operating ratios.

On October 11, 1983, Greyhound filed a petition with the ICC under 49 U.S.C. § 11501(e)(3)(A) asking that its New York intrastate rates be increased by 40% on the ground that those rates imposed an unreasonable burden on interstate commerce. Greyhound did not attempt to invoke the presumption of an unreasonable burden by showing that its revenues under those rates fell short of recovering its variable costs of performing intrastate transportation in New York. Indeed, it was conceded that those revenues exceeded variable costs. Moreover, Petitioner had found that Greyhound's intrastate operating expenses were only 90.78 percent of its intrastate revenues, i.e., that those revenues exceeded full costs. Instead, Greyhound invoked the presumption by showing that its New York intrastate rates were lower than its interstate rates.

To rebut the presumption of an unreasonable burden on interstate commerce Petitioner adduced evidence that (1) the profit margins on Greyhound's intrastate operations were greater than those on its Eastern Division's operations, (2) the State had a subsidy program under which Greyhound received $702,500 in 1983, (3) Greyhound had been allowed to eliminate numerous unprofitable intrastate routes. Greyhound did not challenge Petitioner's showing of profitability. Indeed, they were based on its own data.

On December 12, 1983, the ICC served its decision authorizing Greyhound to increase its New York intrastate rates by 40 percent. The ICC's decision recited Petitioner's evidence, including its evidence that Greyhound's intrastate New York operations were more profitable than its Eastern Division's operations. However, it ignored this evidence in reaching its conclusion that Petitioner's denial of the 40 percent increase "results in intrastate rates which cause unreasonable discrimination against, and impose an unreasonable burden on, interstate commerce." Rather, it held that evidence that intrastate operations were more profitable than interstate operations was "simply not on point." Appendix B, p. 24a. In short, the ICC held that the mere fact that intrastate rates are lower than interstate rates establishes an unreasonable discrimination against and an unreasonable burden on interstate commerce.

Upon review of the ICC's decision the Court of Appeals held: First, proof that the level of intrastate rates is lower than the level of interstate rates, without more, raises a presumption of an unreasonable discrimination against or burden on interstate commerce.[2] Second, the standards this Court has established for determining whether intrastate rail rates unreasonably burden interstate commerce have no application in determining whether intrastate bus rates unreasonably burden interstate commerce. Third,

---

[2] The Court below rejected Petitioner's argument that before invoking this presumption the ICC must find the existence of both one of the three criteria listed in Subsection (A) of 49 U.S.C. § 11501(e)(2) *and* the criterion listed in Subsection (B). Petitioner thinks the Court was wrong, but does not challenge its holding at this time.

operating ratios are too unreliable to be accepted as evidence that state rate regulation does not burden interstate commerce. The Court then concluded that the ICC had not acted arbitrarily or capriciously in rejecting the evidence adduced to rebut the presumption.

The third holding does not rest on any finding or holding of the ICC. Rather, it rests on the claim of counsel for the ICC and Greyhound, that operating ratios are not reliable because there is no way to allocate a portion of a carrier's total expenses to its intrastate operations that is not arbitrary. The Court, saying that the ICC "apparently accepted this argument," held that it could reasonably conclude that the operating ratios were "unreliable and insufficient to rebut Section 11501(e)(2)'s presumption." Appendix A, p. 15a. The difficulty with this is that the ICC reached no such conclusion. There is no suggestion whatever in its decision that operating ratios are unreliable. The sole basis of the decision was that evidence of operating ratios is irrelevant.

REASONS FOR GRANTING THE WRIT

I. The Scope of the ICC's Authority to Preempt Intrastate Bus Rate Regulation Presents an Important Federal Question that Should be Decided by this Court

The decision of the Court of Appeals here does not merely hold that the ICC's decision in the case before it was neither arbitrary nor capricious. It goes much further. As Petitioner will show *infra*, the Court holds wholly inapplicable the standards this Court has established for implementation by the ICC of a Congressional grant of authority to preempt state rate regulation that "causes unreasonable discrimination against

or imposes an unreasonable burden on interstate or foreign commerce." Thus, the Court below has approved a policy of the ICC to raise intrastate bus rates whenever they are lower than interstate rates regardless of whether or not they unreasonably burden interstate commerce, and regardless of whether or not the intrastate rates proposed by the carrier are higher than necessary to remove any such burden.[3]

Complete preemption of state authority is, indeed, the policy of the ICC. This is demonstrated by an analysis of twenty-eight of the forty-five decisions under 49 U.S.C. § 11501(e) it has thus far rendered.[4] Appendix F, p. 42a. In fourteen cases the Commission held that evidence that the existing lower intrastate rates were profitable was not probative. In these cases, the ICC assumed that the conditions and hence the costs of intrastate operations were the same as the conditions and hence the costs of interstate operations. On this assumption it inferred that lower intrastate rates unreasonably burdened interstate commerce. In two cases the ICC held that evidence that revenues per passenger mile were higher for intrastate operations than for interstate operations was not probative. In these two cases the ICC assumed that the conditions

---

[3] The Chief of the ICC's Section of Financial Analysis, using Greyhound's data, calculated that, with a 40% increase, the New York intrastate operation ratio would be 70.55%, nearly 8 percent lower (better) than its New York interstate ratio of 78.06%. Thus, Greyhound's New York intrastate operations contribute more than their aliquot share of Greyhound's revenue needs.

[4] In fifteen of the other cases the state made no effort to rebut the presumption of an unreasonable burden, and in two the ICC dismissed the carrier's petition for failure to comply with procedural requirements.

and hence the costs of intrastate operations were different than the conditions and costs of interstate operations. On this assumption it inferred that the intrastate rates unreasonably burdened interstate commerce notwithstanding that they produced higher revenues per passenger mile than the interstate rates. In short, the ICC makes whatever assumption supports preemption.

In nine cases the ICC held that the allocation of costs between intrastate and interstate service was arbitrary and therefore not probative, and in three it held that evidence that interstate rates were unreasonably high was not probative. Taken together, these twelve cases say that there is no way to allocate total expenses between intrastate and interstate operations. These actions contrast with the ICC's action in Docket No. MC-59238 (Sub-No. 74), *Petition of Virginia Stage Lines* (not printed), served March 23, 1984. In that case the ICC relied upon an allocation of expenses to a particular operation in order to permit a bus carrier to abandon an intrastate service. In short, the ICC accepts allocations of costs if they support preemption and rejects them if they do not.

As it was free to do, the ICC chose not to institute a rulemaking proceeding for the purpose of establishing standards by which to determine whether intrastate bus rates unreasonably burden interstate commerce. Instead, it chose to establish a single standard in the course of its decisions in particular cases. The twenty-eight decisions make clear what the standard is—Any intrastate bus rates that are lower than interstate bus rates unreasonably discriminate against and unreasonably burden interstate commerce. This, of course, is a complete preemption of state authority in violation of 49 U.S.C. § 11501(e).

II. The Lower Court's Decision Misconstrues an Important Statute Governing Federal/State Relationships and is in Conflict with the Applicable Precedents of this Court

The Transportation Act of 1920 gave the ICC authority to require intrastate rail rates to be raised in order to remove "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce." Former Section 13(4) of the Interstate Commerce Act, former 49 U.S.C. § 13(4). 41 Stat. 484. This Court construed this provision to authorize the ICC to require intrastate rates to be increased if the revenues therefrom were not contributing their fair share of the carriers' overall revenue needs. *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U.S. 563 (1922).

Section 13(4) was codified in 1978 in 49 U.S.C. § 11501. Subsection (a) thereof gives the ICC authority to increase any intrastate rail rate that "causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce." The codification may "not be construed as making a substantive change in the laws replaced," Section 3 of Pub. L. 95-473 (1978), 92 Stat. 1466. Hence, this Court's cases delimiting the scope of the ICC's power under Section 13(4) also delimit the scope of its authority under Subsection (a) of 49 U.S.C. § 11501.

Section 17 of the Bus Regulatory Reform Act, 49 U.S.C. § 11501(e), gives the ICC precisely the same authority over intrastate bus rates in precisely the same words as Subsection (a)(2) thereof gives it over intrastate rail rates, i.e., authority to raise any rate that "causes unreasonable discrimination against or imposes an unreasonable burden on interstate or for-

eign commerce." It follows that this Court's cases delimiting the scope of the ICC's authority over intrastate rail rates also delimit its authority over intrastate bus rates.

49 U.S.C. § 11501(e)(1), no more than 49 U.S.C. § 11501(a), makes no attempt to deprive the states of their primary authority to regulate increases in intrastate rates.[5] As this Court put it in *State of North Carolina* v. *United States,* 325 U.S. 507, 511 (1945):

> "Intra-state transportation is primarily the concern of the state. The power of the Interstate Commerce Commission with reference to such intra-state rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. A scrupulous regard for maintaining the power of the state in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet 'a high standard of certainty.' Before the Commission can nullify a state rate, justification for the 'exercise of the federal power must clearly appear.' * * * The . . . cases also stand for the principle that the Interstate Commerce Commission is without authority to supplant a state-prescribed intra-state rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission." (Citations omitted.)

Subsequently, in *Public Service Commission of Utah* v. *United States,* 356 U.S. 421, 425-426 (1958),

---

[5] In contrast, 49 U.S.C. § 11501(e)(4) forbids states to regulate reductions in intrastate bus rates. The ICC is given exclusive power to regulate such reductions to assure that they are not predatory in contravention of the National Transportation Policy.

this Court set forth the following findings as requisite for an order of the ICC requiring intrastate rates to be increased:

> "(1) that existing intrastate rates were abnormally low and did not contribute a fair share of the railroads' revenue needs; (2) that conditions as to the movement of intrastate traffic were not more favorable than those existing in interstate commerce; (3) that the rates cast an undue burden on interstate commerce; (4) that the increase ordered by the Commission would yield substantial revenues; and (5) that such increase would not result in intrastate rates being unreasonable and would remove the existing discrimination against interstate commerce."

The court below held that these standards need not be met and these findings need not be made in the case of orders requiring intrastate bus rates to be increased. Speaking of the requirements of this Court as set out in *North Carolina,* that decisions preempting state regulatory authority must meet a "high standard of certainty," and that justification for the exercise of the federal power "must clearly appear," the Court below said that they were inapplicable. Appendix A, p. 14a. The reason it gave was that, in the case of bus rates, the Congress "made a decision to allow substantial pre-emption of state regulatory authority." Hence, it said that "the rigid requirements" of *North Carolina* "do not apply to the Commission's decision made pursuant to the Bus Act." From this it concluded that the ICC's decision need not be supported by substantial evidence, but rather will be sustained unless it is arbitrary or capricious.

There is absolutely nothing in 49 U.S.C. § 11501(e) or in its legislative history to support the views of the

Court below. Quite the contrary. The authority the ICC is there given is in precisely the same terms as the authority it was earlier given over intrastate rail rates. And the legislative history makes plain that the Congress intended that "states would continue to regulate [intrastate] bus rates." Thus, "while ensuring that State regulatory control of intrastate rates is maintained," the Congress created a "mechanism whereby state determinations that constitute an undue burden on interstate commerce can be overturned on a case-by-case basis." S. Rep. No. 97-411, 97th Cong., 2d Sess. 5, 28 (1982). H. Rep. No. 97-334, 97th Cong., 1st Sess. 44-46 (1981).

It is true that in the case of intrastate rail rates the burden is upon the carrier to adduce evidence of unreasonable burden, while in the case of bus rates the fact that intrastate rates are lower than comparable interstate rates creates a rebuttable presumption of such a burden. But the only effect of the presumption is to cast upon one opposing federal preemption the burden of adducing evidence to show that the intrastate rates do not unreasonably burden interstate commerce. Petitioner carried his burden of going forward with such evidence. The purpose of the presumption having been thus accomplished, the ICC had the duty to make the findings this Court requires to support an order increasing intrastate rates on the ground that they unreasonably discriminate against or unreasonably burden interstate commerce.

The test by which the existence *vel non* of an unreasonable discrimination or burden is to be determined was stated by this Court in *Chicago, Milwaukee,*

St.P. & P.R. Co. v. *State of Ill.*, 355 U.S. 300, 305-306 (1958), as follows:

> "The occasion for the exercise of the federal power asserted by § 13(4) is the necessity for effecting the required contribution by intrastate traffic of its proportionate share of the revenues necessary to pay a carrier's operating costs and to yield a fair return (fn. omitted). When intrastate revenues fall short of producing their fair proportionate share of required total revenues, they work an undue discrimination against interstate commerce, and the ICC may remove the discrimination by fixing intrastate rates high enough reasonably to protect interstate commerce."

Petitioner, on the basis of Greyhound's own presentation to it in the proceeding in New York, found as a fact that Greyhound's revenues from its intrastate New York operations were more profitable than its Eastern Region operations. Petitioner adduced this evidence in the proceeding before the ICC. Greyhound did not challenge it in either proceeding. The ICC's Chief of Financial Analysis, comparing operating ratios, found that a 40 percent increase would make Greyhound's already profitable New York intrastate operations substantially more profitable than its New York interstate operations. Such comparisons of operating ratios are precisely the type of evidence this Court pointed to in the *Utah* case, 356 U.S. at 426, as indicating that conditions as to the movement of intrastate traffic are more favorable than those as to the movement of interstate traffic. (Utah operating ratios more favorable than comparable systemwide ratios.)[6]

---

[6] As for the reliability of operating ratios, they are the universally accepted standard for comparing the profitability of one seg-

Hence, Petitioner clearly rebutted the presumption of an unreasonable discrimination against or unreasonable burden on interstate commerce. The ICC's answer was that Petitioner's evidence is "simply not in point," i.e., is irrelevant. In short, it is clear from this case and the other cases in which a state adduced evidence (Appendix F) that the ICC has converted a rebuttable presumption into an irrebuttable presumption. This, of course, is in flat disregard of the plain and unambiguous terms of 49 U.S.C. § 11501 (e)(2), and of this Court's rule that:

> "The mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates." *Florida* v. *U.S.*, 282 U.S. 194, 211 (1931). Quoted with approval in *North Carolina, supra,* at 325 U.S. 516.

---

ment or type of traffic *vis à vis* another segment or type. For example, the ICC's rules require motor common carriers of property proposing rate increases or changes in their rate structures to show operating ratios for this purpose. See 49 C.F.R. § 1104.3. And the ICC relies on an allocation of a portion of a carrier's costs to a particular operation to justify the exercise of its authority under 49 U.S.C. § 10935(e)(4) to permit a bus carrier to abandon or reduce intrastate service on particular routes. See ICC Docket No. MC-59238 (Sub-No. 74), *Petition of Virginia Stage Lines, supra.*

CONCLUSION

For all of the foregoing reasons Petitioner asks the Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit in order to review its opinion and judgment affirming the decision and order of the Interstate Commerce Commission in this case.

Respectfully submitted,

ROBERT ABRAMS*
Attorney General of the
State of New York

ROBERT HERMANN
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General
The Capitol
Albany, N.Y. 12224
(518) 474-8101

BRYCE REA, JR.
DONALD E. CROSS
LEO C. FRANEY
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 785-3700

Counsel for Petitioner

* Counsel of Record

Of Counsel:

REA, CROSS & AUCHINCLOSS
Suite 700
One Thomas Circle, N.W.
Washington, D.C. 20005

January 1985

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1424—August Term, 1983

(Argued June 25, 1984 Decided September 18, 1984)

Docket No. 84-4017

THE COMMISSIONER OF TRANSPORTATION OF THE STATE OF NEW YORK,

Petitioner,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

Before:

KEARSE, PIERCE, and MARKEY,*

Circuit Judges.

Appeal from an order of the Interstate Commerce Commission preempting New York State regulation of

* Chief Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

intrastate bus fares and granting Greyhound Lines, Inc., a forty percent general fare increase. The order is affirmed.

CARMINE J. CLEMENTE, Albany, New York (Darrell W. Harp, William J. Dwyer, Eric M. Kerness, Counsel to the Commissioner of Transportation of the State of New York, of counsel), *for the Petitioner.*

J. PAUL MCGRATH, Washington, D.C. (John J. Powers, III, John P. Fonte, Department of Justice, John Broadley, Ellen D. Hanson, Evelyn G. Kitay, Interstate Commerce Commission, of counsel), *for Respondents.*

PATRICK J. FOGARTY, Mineola, New York (Lat J. Celmins, of counsel), *for the Intervenor.*

PIERCE, *Circuit Judge*:

We consider herein a challenge to the action of the Interstate Commerce Commission ("ICC" or "Commission"), preempting New York State regulation of intrastate bus fares and prescribing such rates itself. We conclude that the ICC acted within the bounds of its statutory authority and that its decision was neither arbitrary nor capricious. Consequently, we affirm.

I. BACKGROUND

In May of 1983, Greyhound Lines, Inc. ("Greyhound") applied to the New York State Department of Transportation ("NYDOT") for permission to increase its New York intrastate passenger rates by forty percent. In response to requests by the NYDOT, Greyhound produced various financial exhibits pertaining to both its New York and national operations. Among these was a corporate income statement for the quarter ending March 31, 1983. This statement showed a net operating loss for Greyhound's national bus division of over $20 million in those three months. Of that loss, Greyhound's New York intrastate passenger operations accounted for $500,450. This loss is in contrast to the overall profitability of Greyhound's New York combined inter and intrastate operations.[1] These combined operations had an operating ratio of 86.38 percent. ("Operating ratio" is a carrier's operating expenses expressed as a percentage of its revenues. Greyhound's 86.38 percent operating ratio means that for every dollar it earned in New York, Greyhound incurred 86.38 cents in expenses, thus earning a profit of 13.62 cents.) Greyhound also presented earnings projections for the pro forma year 1983. (The pro forma year is a twelve month period not necessarily coinciding with the calendar year. It is used to make financial projections.) From these earnings projections Greyhound estimated that its New York intrastate operating ratio, when adjusted to reflect certain fare increases recently granted by the NYDOT, would be 90.78 percent. In sum, Greyhound's financial

---

[1] Intrastate passengers include all persons whose passage does not take them across state lines. A person remains an intrastate passenger even though the bus on which he rides does cross state lines and is engaged in interstate commerce. Thus, a given bus may carry both inter and intrastate passengers. *Cf.* 49 U.S.C. § 11501(e)(1) (1982).

exhibits showed: (1) that both Greyhound's national bus operations and its New York intrastate bus operations were currently losing money; (2) that Greyhound's New York interstate passenger services were profitable and effectively subsidizing its unprofitable intrastate operations; and (3) that if all estimates proved correct Greyhound's New York intrastate operations would become profitable—though still less so than its interstate operations—in the coming year.

The NYDOT suspended Greyhound's proposed fare increase and ordered an investigation. (Absent affirmative action by the state Greyhound's fare increase would have taken effect automatically. N.Y. Transportation Law § 142 (11) (1975).) Following a hearing, a New York administrative law judge ("ALJ") denied the sought increase in its entirety. The ALJ acknowledged that "there is no question but that Greyhound's fares within New York are less than its interstate fares" but denied any fare increase because: (1) Greyhound's projected New York intrastate operating ratio indicated future profitability; and (2) over the previous five years New York had granted Greyhound intrastate fare increases greater than those allowed by the ICC for interstate operations.

Following the NYDOT's denial, Greyhound filed with the ICC a request for a forty percent rate increase pursuant to the Bus Regulatory Reform Act of 1982 ("Bus Act" or "Act"), codified at 49 U.S.C. 11501. Under this provision, the ICC has authority to preempt state regulation and to prescribe intrastate bus fares when it finds that state action constitutes an "unreasonable burden" on interstate commerce. The statute further provides that the Commission shall presume a burdening of interstate commerce if it finds that certain facts—including a differential between inter and intrastate fares—

exist. This presumption is, however, rebuttable. 49 U.S.C. 11501(e)(2) (A)(i).

In proceedings before the ICC, Greyhound invoked this presumption that New York's rate regulation constituted an unreasonable burden on interstate commerce. In reply, the NYDOT acknowledged that Greyhound's New York intrastate fares are lower than comparable interstate fares.[2] However, it argued that its regulation did not constitute an unreasonable burden on interstate commerce because: (1) Greyhound's projected New York interstate operating ratio indicates future profitability, (2) Greyhound has received substantial subsidies (and significant recent fare increases) from New York State, (3) Greyhound has been able to eliminate unprofitable routes in New York with minimal regulatory interference from NYDOT, and (4) Greyhound has a monopoly over a substantial number of routes in New York.

By way of rebuttal, Greyhound explained that its recent New York intrastate fare increases were high because the NYDOT previously had allowed only inadequate rate relief resulting in depressed New York intrastate fares. Greyhound also argued that its own projected earnings statement for the pro forma year was overly optimistic because it had been assumed that fare increases would go into effect earlier than in fact allowed. Moreover, Greyhound generally attacked the reliability of operating ratios as indicators of profitability. Greyhound further stated that New York's subsidy could not justify the proven rate discrepancy because it covered only variable costs[3] over particularly unprofitable routes and provided

---

2 A rate disparity is determined by comparing fares between two pairs of cities. The distance between the cities of either pair is equal but one route is interstate, the other intrastate.

3 Variable costs are those costs that vary proportionally with miles travelled. Fuel costs are an example of variable costs.

no money to meet fixed or fully allocated costs for those routes. In addition, Greyhound argued that there is no assurance these subsidies will continue. Finally, Greyhound asserted that it had not been able to eliminate unprofitable operations as easily as New York contended and that it had vigorous competition from Trailways, Amtrak, and independent airlines.

After consideration, the ICC issued its decision preempting New York State regulation of intrastate bus fares and granting Greyhound its requested forty percent fare increase. The Commission held that Greyhound had successfully invoked the statute's rebuttable presumption that state regulation burdened interstate commerce and that the evidence presented by the state failed to rebut that presumption.

On appeal, New York argues that the Commission misinterpreted the subject statute. It contends that the ICC acted improperly by (1) invoking the statutory presumption upon finding the existence of only one specified precondition and (2) according the statutory presumption excessive evidentiary weight. New York also contends that even if Greyhound could properly invoke the statute's presumption, NYDOT's evidence rebutted the presumption and clearly demonstrated that the state regulation did not constitute an unreasonable burden on interstate commerce. We address each of these contentions seriatim.

II. DISCUSSION

New York's first contention is that the Commission has misinterpreted and consequently improperly applied the rebuttable presumption provision of 49 U.S.C. § 11501(e)(2). The relevant wording of the statute is set

forth in the margin.[3] The section provides that upon finding that certain conditions exist—included among these that intrastate rates are lower than interstate rates for comparable travel—the Commission shall presume that the challenged state regulation burdens interstate commerce.

The Commission, in granting Greyhound's request found that New York State regulation resulted in "the Carrier (Greyhound) charging a rate for (its intrastate) transportation which is lower than the rate such carrier charges for comparable interstate transportation of passengers. . . ." The Commission ruled that this sufficed to invoke the Act's rebuttable presumption provision. New York challenges this interpretation.

New York argues that Greyhound could not properly invoke the Act's presumption that state regulation burdens interstate commerce unless the Commission could find *both* that Greyhound's New York intrastate fares were less than its fares for comparable interstate passages *and* that the most recent fare increase granted Greyhound by the NYDOT is less than that granted Greyhound by the Commission. New York's argument proceeds as follows: Section 11501(e)(2) states that in considering a carrier's request for relief from state regulation, the Commission shall utilize a rebuttable presumption that the challenged state regulatory practice burdens interstate commerce. It notes that section 11501(e)(2) contains two subsections: Subsection (A) contains a list of three conditions, one of which must be found to give rise to the rebuttable presumption. Subsection (B) states that the same presumption shall apply if the most recent general fare increase granted by the state is less than that allowed a carrier by the Commission. New York argues that because subsection (A) and (B) are joined by "and," the

Commission before invoking the statutory presumption must find the existence of *both* any one of the three criteria listed in Subsection (A) *and* the situation described in Subsection (B).

We find New York's argument contrary to both the plain language and the legislative history of the Act, and thus we reject its interpretation.

Initially, we note that our role in reviewing an expert agency's interpretation of its own statute is limited. Because "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . ." we must give substantial deference to that interpretation. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 598 (1980). "(I)t is not necessary for a court to find that the agency's construction (is) the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981). Thus, our task is "not to interpret the statute as [we think] best but rather the narrower inquiry into whether the Commission's construction [is] 'sufficiently reasonable' to be accepted by a reviewing court . . . ." *Id.*

Turning to the statute, we find the Commission's interpretation both reasonable and correct. Section 11501(e)(2) states that in considering requests for preemption of state regulation the Commission shall utilize a presumption, and that that presumption shall be rebuttable. The two subsections thereof then go on to set forth two independent presumptions and the conditions that shall give rise to either. Subsection (A)'s presumption that state regulation burdens interstate commerce applies to any state "rate, rule, or practice applicable to transporta-

tion provided by a motor common carrier of passengers entirely in one State . . ." and is to be invoked (1) if there is a disparity between inter and intrastate fares, (2) if the carrier does not receive income from its intrastate operations sufficient to cover the variable costs[4] of providing

---

[4] (e)(1) The Commission shall prescribe any rate, rule, or practice applicable to transportation provided entirely in one State by a motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title—

(A) if the carrier has requested the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice for permission to establish such rate, rule or practice and the request has been denied (in whole or in part) or the State authority has not acted finally (in whole or in part) on the request by the 120th day after the carrier made the request; and

(B) if the Commission finds that the rate, rule, or practice in effect and applicable to such intrastate transportation causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce.

(2) For purposes of paragraph (1)(B) of this subsection, there shall be a rebuttable presumption that—

(A) any rate, rule, or practice applicable to transportation provided by a motor common carrier of passengers entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds—

(i) that such rate, rule, or practice result in the carrier charging a rate for such transportation which is lower than the rate such carrier charges for comparable interstate transportation of passengers;

(ii) on the basis of evidence presented by the carrier, that as a result of such rate, rule, or practice such carrier does not receive revenues from such transportation which exceed the variable costs of providing such transportation; or

(iii) that the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice failed to act finally (in whole or in part) on the request of the carrier to establish such rate, rule, or practice by the 120th day after the date the carrier made the request; and

(B) any rate applicable to transportation entirely in one State imposes an unreasonable burden on interstate com-

such transportation, or (3) if the state agency having jurisdiction over the practice in question fails to act on a carrier's request for alteration thereof within 120 days. Subection (B) contains a separate independent presumption applicable only to regulation of intrastate fares. Subsection (B)'s presumption that an intrastate passenger fare burdens interstate commerce is to be invoked whenever "the Commission finds that the most recent general rate increase applicable to [intrastate transportation] is less than the most recent general rate increase applicable to interstate transportation . . . ." The "and" connecting the two subsections serves only to make clear that Subsection (B) is, as part of 11501(e)(2), a rebuttable presumption to be used in considering a carrier's request for Commission action. As such, "and" is more properly and reasonably read as "or".

Moreover, we find the Act's legislative history supports the Commission's interpretation and not that of NYDOT. Without resort to the section's rebuttable presumption, a carrier seeking preemption of state action would be required to engage in the laborious and time-consuming task of proving to the Commission that a particular challenged state practice burdens interstate commerce. Because Congress expressly found that excessive delays entailed in regulatory proceedings are themselves a burden on commerce, we cannot conclude that such a result was intended. See S. Rep. No. 97-411, 97th Cong. 2d Sess. (1982) ("Senate Report") at 8. In light of Congress' general concern with the burdensomeness of state regula-

---

merce if the Commission finds that the most recent general rate increase applicable to transportation provided by motor common carriers of passengers in such State is less than the most recent general rate increase applicable to interstate transportation provided by motor common carriers of passengers under this subtitle.

tion and its negative effects on interstate commerce, we believe that section 11501(e)(2) was intended to have broader scope than New York's interpretation would allow it. (See Senate Report at 7-11; H.R. Rep. No. 97-334, 97th Cong. 2d Sess. (1982) ("House Report") at 24-27.)

Moreover, Congressional findings as to the effects of certain state practices on interstate commerce support the Commission's interpretation of Section 11501(e)(2). Each paragraph of Section 11501(e)(2)(A) represents a finding by Congress that the named condition—independent of its effect combined with that of any other rate, rule, or practice—unreasonably burdens interstate commerce. Congress found that when intrastate passenger fares are lower than interstate fares for comparable transportation, the more profitable interstate operations must in effect cross-subsidize the less profitable intrastate business (House Report at 25; Senate Report at 9-10), (2) that when intrastate operations are unprofitable, cross-subsidization occurs at an even higher level *id.*, and (3) that slow action by state regulatory agencies costs the industry millions of dollars each year and consequently burdens interstate commerce (Senate Report at 8; House Report at 25). In light of these findings, we would be unreasonable were we to require that the Commission, having found one of the conditions enumerated in 11501(e)(2)(A) to exist, also satisfy 11501(e)(2) (B) before it could invoke the Act's rebuttable presumption.

Finally, Congress' report on Section 11501(e)(2) supports the Commission's interpretation of that section. As Congress explained (H.R. Rep. No. 97-780, 97th Cong., 2d Sess. (1982) ("Conference Report") at 52-53):

> *There is a rebuttable presumption that any intrastate bus rate, rule, or practice imposes an unreasonable*

> *burden on interstate commerce if the ICC finds that*: (1) such rate, rule, or practice results in the carrier charging a rate for intrastate transportation which is lower than the rate for comparable interstate transportation; (2) on the basis of the evidence presented by the carrier, that as a result of such rate, rule or practice, the carrier does not receive revenues which exceed the variable costs of providing such transportation; *or* (3) the appropriate State authority failed to act finally on the request of the carrier to establish such rate, rule, or practice by the 120th day after the date the carrier made the request.
>
> *Any rate applicable to solely intrastate transportation imposes an unreasonable burden* on interstate commerce *if* the ICC finds that the most recent general rate increase applicable to bus transportation in the State is less than the most recent general rate increase applicable to interstate common carrier bus transportation (emphasis added).[5]

Thus, it is clear that Congress evisioned four separate rebuttable presumptions, *viz* the three embodied in 11501(e)(2)(A) and the fourth separate presumption of 11501(e)(2)(B).

For the foregoing reasons we conclude that the Commission's interpretation of the act is correct and that the finding of disparity between Greyhound's New York inter and intrastate passenger fares was sufficient to give rise to the Act's presumption.

We now turn to New York's contentions that it adequately rebutted any presumption that its regulation burdens interstate commerce and that the Commission failed

---

5 We note that the "and" upon which petitioners rely so heavily is absent from the Conference Report.

to make adequate findings to support its rejection of New York's rebuttal evidence.

Relying on *North Carolina v. United States*, 325 U.S. 507, 511 (1945), New York argues that the I.C.C.'s decisions to preempt state regulatory authority must meet a "high standard of certainty" and that the justification for the exercise of federal power "must clearly appear" in the Commission's opinion. We find *North Carolina v. U.S.* inapposite and, hence, we reject this argument. *North Carolina v. U.S.* involved the interpretation of section 13(4) of the Interstate Commerce Act, 49 U.S.C. § 13(4). Under that Act, the Commission was allowed limited authority to preempt state regulation of intrastate rail rates. The Commission could exercise this authority only if it found after investigation and "full hearing" that an intrastate rate caused "unjust discrimination" against interstate commerce. The situation here is considerably different. In passing the Bus Act in 1982, Congress was concerned that regulation in general and state regulation in particular had substantially undermined the financial base of the bus industry. See Senate Report at 7-11; House Report at 24-27. Congress realized that state regulation often kept intrastate fares at artificaliy low levels and forced bus companies to continue operating unprofitable intrastate routes. Congress appreciated that these practices effectively forced bus companies to subsidize intrastate operations by overcharging interstate passengers and realized that under the Act, the ICC necessarily would preempt state regulation in order to eliminate these burdens on interstate commerce. See House Report at 44; Senate Report at 7-8; Conference Report at 52. Thus, Congress has made a decision to allow substantial preemption of state regulatory authority (see Senate Report at 7-8; House Report at 24), and the role of this

Court in reviewing such a decision is clearly different from that it assumes in considering Commission action which is taken pursuant to less explicit or less broad authority. We therefore hold that the rigid requirements of *North Carolina v. U.S.* do not apply to the Commission's decisions made pursuant to the Bus Act. Rather, review of the Commission's decision herein is governed by 5 U.S.C. 706, and we can "set aside agency action, findings, and conclusions [only if] found to be . . . arbitrary [or] capricious . . . ." Judging the Commission's action by this standard, we hold that it must stand.

Against Greyhound's invocation of section 11501(e)(2)'s presumption, New York presented four arguments that the Commission rejected. New York argued (1) that Greyhound's projected New York intrastate operating ratio showed that those operations would become profitable and hence could not be a burden on interstate commerce, (2) that New York had allowed Greyhound to pare unprofitable routes with minimal difficulty, (3) that Greyhound possessed substantial monopoly power over certain parts of the state, and (4) that New York had provided Greyhound with substantial subsidies. The Commission rejected these arguments finding that, excepting the subsidy issue, none of New York's arguments indicated differences in operating conditions or cost of services, and that only such factors could justify holding intrastate fares at levels lower than those allowed for comparable interstate transportation. We deal with each of these rebuttal arguments in turn.

New York relies principally on Greyhound's projected intrastate operating ratio as evidence that its fare regulation does not burden interstate commerce. Greyhound's financial projections for the 1984 pro forma year show a 90.78 intrastate operating ratio. (In other words, for

every dollar of revenues that Greyhound collects, it incurs 90.78 cents in expenses.) Greyhound argued before the Commission that this operating ratio is insufficient to rebut 11501(e)(2)'s presumption. Specifically Greyhound argues that operating ratios (especially those based on pro forma year projections) are too unreliable to be accepted as evidence that state fare regulation does not burden interstate commerce. The Commission apparently accepted this argument. We agree with Greyhound and the Commission.

The calculation of intrastate versus combined operating ratios involves a number of highly arbitrary accounting assumptions used to allocate revenues and expenses between intra and interstate operations. This is necessary because both types of service are simultaneously provided on one bus: a given bus typically contains both interstate and intrastate passengers. The normal method for allocating expenses between the two operations is on the basis of passenger miles.[6] The major problem with this method is that many costs do not vary proportionally with the length of a trip, e.g., costs of ticketing, baggage handling, and other station expenses. Consequently, the actual cost per mile of shorter trips is typically significantly higher than that of longer ones. Because, *intra*state trips are typically shorter than *inter*state trips, the expenses allocable to the former are necessarily underestimated by an accounting method which assigns expenses on the basis of passenger miles.[7] Thus the Commission could reasonably

---

6 A passenger mile is one mile travelled by one passenger. Thus, ten passengers travelling ten miles each would have travelled one hundred passenger miles.

7 *See* MC-C-10901, Petition of Greyhound Lines, Inc., for Review of a Decision of the West Virginia Public Service Commission Pursuant to 49 U.S.C. 11501 (April 13, 1984).

conclude that the operating ratio evidence presented by New York was unreliable and insufficient to rebut Section 11501(e)(2)'s presumption.

Moreover, we note that the operating ratio evidence may be irrelevant. New York concedes that Greyhound's projected combined inter and intrastate operating ratio is 81.44 and is thus significantly more profitable than its projected intrastate operating ratio. (Greyhound's 1982 combined New York inter and intrastate operating ratio was 86.38 and is also more profitable than either its proven 1982 or projected 1983 intrastate operating ratio.) Thus, to the extent that market forces allow, Greyhound has raised its *inter*state fares above intrastate levels in order to increase overall profitability to a level the ICC considers appropriate. Given this situation, interstate operations are subsidizing intrastate operations. Thus, we conclude that the Commission's rejection of New York's operating ratio evidence was neither "arbitrary" nor "capricious."

We next address New York's arguments that because it had allowed Greyhound to eliminate unprofitable routes with minimal difficulty and because Greyhound has monopoly power in substantial areas of the state, the proven disparity between inter and intrastate fares does not burden interstate commerce. The Commission rejected these arguments as irrelevant because they do not evidence any difference in operating costs or conditions. We agree with the Commission. Although these arguments may support the wisdom of regulation in general and the beneficence of New York's regulation in particular, they do not significantly relate to the existing disparity between inter and intrastate passenger fares to rebut the statutory presumption.

Finally, we turn to the subsidy that New York, in the past, has granted Greyhound. In its decision, the Commission agreed with New York that the subsidy did reflect on differences in operating costs and conditions. However, the Commission concluded that the possibility of a continuing subsidy was not sufficient to justify the existing rate disparity. The Commission noted that Greyhound had presented evidence showing that the subsidy provided funding sufficient only to cover variable costs over certain extremely unprofitable routes, that no subsidy was provided to cover fixed costs, and that the subsidy was not permanent and probably would not be available in the future. Considering these arguments, the Commission concluded that (1) the subsidy was not permanent (and indeed New York conceded it would not be available in the coming year), (2) even with the subsidy factored proportionally into Greyhound's intrastate rates those rates would be significantly lower than its interstate rates, and (3) hence the subsidy was insufficient to rebut the Bus Act's presumption that the rate disparity herein burdens interstate commerce. Viewing the evidence, we find the Commission's decision reasonable.

III. CONCLUSION

We conclude that the Commission correctly interpreted 49 U.S.C. § 11501(e)(2) when it determined that the existence of a rate disparity was, without more, sufficient to invoke the Act's rebuttable presumption provision. We futher conclude that the Commission did not act arbitrarily or capriciously in rejecting New York's attempt to rebut the Act's presumption. For these reasons, we affirm the Commission's decision.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-10885

PETITION OF GREYHOUND LINES, INC., FOR REVIEW OF A DECISION OF THE NEW YORK STATE DEPARTMENT OF TRANSPORTATION PURSUANT TO 49 U.S.C. 11501

Decided: December 8, 1983

By petition filed October 11, 1983, Greyhound Lines, Inc., (Greyhound or petitioner) seeks review pursuant to 49 U.S.C. 11501(e) of a decision of the New York State Department of Transportation (NYDOT) which denied petitioner's application to increase rates applicable to the intrastate transportation of passengers. Petitioner asserts that the denial of the increase by NYDOT causes unreasonable discrimination against, and imposes an unreasonable burden on, interstate commerce. Greyhound requests this Commission to review the record and prescribe rates for the involved intrastate transportation at the level originally sought before NYDOT. NYDOT responded to the petition, and Greyhound filed a rebuttal statement.

The petition is filed under Section 17 of the Bus Regulatory Reform Act of 1982 (Bus Act), Pub. L. 97-261, 96 Stat. 1102, codified at 49 U.S.C. 11501(e). Section 17 permits an interstate motor common carrier of passengers to seek this Commission's review of: (1) a State's decision resulting in intrastate rates, rules, or practices which unreasonably discriminate against, or impose an unreasonable burden on, interstate or foreign commerce; or (2) a State's failure to act within 120 days on a carrier's request for permission to establish a rate, rule, or practice. Regula-

tions implementing this new law were adopted in Ex Parte No. MC-160, *Procedures for Review of Intrastate Bus Rates,* 133 M.C.C. 10 (1982), and are codified at 49 CFR 1143. In a subsequent decision in that proceeding served January 18, 1983, and reported at 133 M.C.C. 47, we concluded that our Section 17 jurisdiction extends to cases pending before the States on the effective date of the Bus Act (November 19, 1982).

BACKGROUND

On May 24, 1983, Greyhound filed a request with NYDOT seeking a 40 percent increase in passenger fares in two stages: 20 percent on July 1, 1983, and 20 percent on October 1, 1983. On June 22, 1983, NYDOT issued an order suspending the proposed increases, and hearing was held before NYDOT at Albany, NY, on July 19, 1983. On September 14, 1983, the Administrative Law Judge (ALJ) issued his final order denying petitioner's requested increase in passenger fares.

The ALJ found that there was "no question" that Greyhound's present intrastate fares in New York were less than its interstate fares for transportation between the same points. However, the ALJ also concluded that there was little question that Greyhound's present operations in the State were already profitable. Without the increases, Greyhound was expected to enjoy an operating ratio for the pro forma year ending December 31, 1983, of 90.78 percent for intrastate operations in New York. With the increases implemented according to the proposed schedule, Greyhound would be expected to enjoy an even more favorable operating ratio of 81.44 percent.

The ALJ found that the only justification for Greyhound's application lay in the fact that its revenues per passenger mile for intrastate New York operations were less than those for New York interstate operations, even

though it had been granted intrastate fare increases of 64 percent over the last five years as opposed to interstate fare increases of only 59.3 percent. The ALJ stressed Greyhound's acknowledgement that its New York intrastate operations are perhaps the most profitable of any intrastate operations conducted within its Eastern Division (which constitutes all States east of the Mississippi River). The ALJ concluded that "it would appear that Greyhound is trying unjustly to strengthen its Eastern Division's profits at the expense of the New York intrastate passenger, under the guise of the Bus Regulatory Reform Act," and further that there was little question but that New York intrastate passengers were contributing a greater share than those in the rest of the Division to the company's profits. Accordingly, the ALJ found that the record did not support any rate increase at that time.

CONTENTIONS OF THE PARTIES

Greyhound argues that the petition should be granted because it has established conclusively the statutory presumption at 49 U.S.C. 11501(e)(2)(A)(i). Specifically, petitioner asserts that because its interstate passenger fares are lower than its interstate passenger fares for comparable service within New York, its current fares impose an unreasonable burden on interstate commerce.

Regarding the rate disparity, petitioner claims that its intrastate passenger fares currently in effect are substantially lower than its comparable interstate passenger fares. Greyhound illustrates this disparity by comparing intrastate to interstate fares between 10 city pairs. The presentation indicates that the intrastate fares require increases ranging from 87 to 106.5 percent just to equal their interstate counterparts. Thus, Greyhound points out, even with a grant of the requested 40 percent increase, intrastate fares will still be significantly less than interstate fares for comparable interstate travel. Greyhound argues

that while it is desirous of improving its operating ratio, it is inappropriate for NYDOT to premise its decision on an operating ratio basis without regard to the fact that New York intrastate rates cause an unreasonable discrimination against and impose an unreasonable burden on interstate commerce.

In its reply, NYDOT makes three points: (1) that its ruling is reasonable, (2) that differences exist between intrastate and interstate services, and (3) that Greyhound enjoys a monopoly and captive market in most areas of the State.

Regarding the first point, NYDOT states that Greyhound's New York intrastate operations are already profitable (its operating ratio: 90.78 percent), that they would be more profitable through December 1983, if the fare increases were granted as proposed (its operating ratio: 81.44 percent), and, based on NYDOT's own calculations, that they would be even more profitable through September 1984 (its operating ratio: 75.3 percent). NYDOT concluded that Greyhound's current profit margin is reasonable, and that those profit margins which would be realized if Greyhound were granted its proposed fare increases would be in excess of any profit margins that have been considered reasonable by either this Commission or any other regulatory agency. NYDOT also reiterates that it has, since 1979, granted Greyhound intrastate fare increases totalling 64 percent, which are above Greyhound's interstate fare increases of 59.3 percent granted by this Commission.

Regarding the second point, NYDOT argues that any contention that Greyhound's New York intrastate fares are a burden on interstate commerce when they are in fact producing a higher profit margin than the margin produced by Greyhound's Eastern Division (which provides predominantly interstate service) is specious. NYDOT recalls that, through December 1983, Greyhound has pro-

jected that its Eastern Division will operate at a 96.34 percent operating ratio, as compared to a 90.78 percent operating ratio forecast by Greyhound on its New York intrastate operations. NYDOT also states that during 1983 Greyhound will receive over $700,000 in State operating assistance, a figure expected to approach $1 million in 1984. Additionally, NYDOT states that Greyhound has been able to rationalize its system in New York and eliminate unprofitable routes with a minimal amount of State regulatory interference. It cites examples.

Finally, regarding the third point, NYDOT states that while the Bus Act clearly envisions a deregulated environment for the intercity bus industry, and while the Interstate Commerce Commission has moved rapidly toward a freer entry policy, the intercity bus industry has not responded quickly enough to provide a truly competitive environment. The result, claims NYDOT, is competitive services between major metropolitan areas such as the Albany-Syracuse-Rochester-Buffalo corridor, and non-competitive or monopolistic service in the balance of the State. Thus, NYDOT argues, Greyhound should not be permitted to operate in captive markets under already favorable profit margins and increase fare levels even further.

On rebuttal, Greyhound submits that it has successfully established the presumption under 49 U.S.C. 11501(e)(2)(A)(i), and that NYDOT has failed to rebut it. The fact remains, Greyhound contends, that its New York intrastate rates are severely depressed and far below interstate rates for comparable transportation.

Specifically, Greyhound takes issue with several statements made by NYDOT. Greyhound argues that NYDOT's reliance on Greyhound's profitability, as measured by its present and projected intrastate operating ratios, is not sufficient to overcome the presumption at 49 U.S.C. 11501(e)(2)(A)(i), as this Commission has recently held in No.

MC-C-10852, *Petition of Peoria-Rockford Bus Company For Review of a Decision of the Illinois Commerce Commission Pursuant to 49 U.S.C. 11501* (not printed), decided May 20, 1983. Greyhound also states that NYDOT''s assertion that its New York intrastate operations provide more of a profit margin than its interstate operations is an inappropriate analysis of the facts because, in fact, Greyhound's New York interstate rates subsidize its intrastate rates for comparable transportation. Greyhound believes its interstate rates may be higher than they otherwise would be if its New York intrastate rates were not so low. Regarding the subsidy received by Greyhound, Greyhound states that NYDOT has simply agreed to provide it with sufficient funding to cover its variable costs on certain low revenue routes, and that this funding does not cover any of its overhead or fixed costs for the affected routes. Greyhound also states that NYDOT has told it that the subsidy may not be available for the fiscal year starting in April 1984, because of Greyhound's profitability in the State. Greyhound further avers that it is an overstatement for NYDOT to say that Greyhound has been able to rationalize its route structure with minimal State regulatory interference, because there remain detailed procedural steps, hearings, significant time delays, and other regulatory barriers which must be overcome before it can adjust its service levels to passenger demand. Finally, Greyhound takes issue with NYDOT's characterization of its service within much of New York as a monopoly. Over every one of its major routes, Greyhound states, it experiences keen competition not only from bus but also from rail and air carriers. Concerning those few local routes without direct bus competition, Greyhound terms these marginal at best and states that, in several instances, but for NYDOT's ''minimal regulatory interference,'' it would have contemplated either transferring these routes to other carriers or discontinuing service altogether.

DISCUSSION AND CONCLUSIONS

After full consideration of the State record and decision, and of the pleadings filed before us, we conclude that NYDOT's denial of petitioner's proposed fare increase results in intrastate rates which cause unreasonable discrimination against, and impose an unreasonable burden on, interstate commerce. Accordingly, we approve the sought increase.

Subsection 11501(e)(2)(A)(i) establishes a rebuttable presumption that an intrastate rate imposes an unreasonable burden on interstate commerce if it is lower than the comparable interstate rate. The record clearly establishes that petitioner's intrastate rates, even at the proposed level, are lower than its interstate rates for comparable service within New York. The record does not document any differences in operating conditions or cost of service sufficient to justify this disparity. NYDOT's attempts to address this issue are, with one exception, simply not on point. Regarding the subsidy issue which does reflect on differences in the cost of service, it appears that even were the subsidy factored proportionately into each intrastate rate, these rates would still be lower than their interstate counterparts. We also note that this subsidy is not necessarily of a permanent nature. Regarding NYDOT's other arguments concerning the reasonableness of its decision and Greyhound's existing profit margins, these too are not sufficient to rebut the presumption that the interstate-intrastate rate differentials for comparable services here create an unreasonable burden on interstate commerce. Accordingly, we will authorize Greyhound to put into effect an increase of 40 percent for passenger service above rates in effect when the application was filed on May 24, 1983.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

We find:

The New York State Department of Transportation's decision of September 14, 1983, to the extent it denied petitioner's proposed rate increase, results in intrastate rates which cause unreasonable discrimination against, and impose an unreasonable burden on, interstate commerce. Implementation of the rate increase of 40 percent for passenger service above rates in effect when the application was filed on May 24, 1983, will remove this unreasonable discrimination and burden.

It is ordered:

The relief sought in the petition is granted. Petitioner is authorized to put into effect the increases in New York intrastate rates proposed in its application filed on May 24, 1983, with the New York State Department of Transportation in Case Nos. 30032 and 30033.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

JAMES H. BAYNE
Acting Secretary

(SEAL)

APPENDIX C

STATE OF NEW YORK
DEPARTMENT OF TRANSPORTATION

APPROVED SEPTEMBER 13, 1983

CASE 30032—Proceeding on motion of the Department as to increased fares and charges proposed by Greyhound Lines, Inc.

CASE 30033—Proceeding on motion of the Department as to increased fares and charges proposed by Greyhound Lines, Inc.

APPEARANCES:

Darrell W. Harp, Assistant Commissioner for Legal Affairs (by William J. Dwyer, Esq., Senior Attorney), New York State Department of Transportation, 1220 Washington Avenue, Albany, N.Y. 12232.

Lat J. Celmins, Esq., Senior Commerce Attorney, Greyhound Tower, Phoenix, Arizona 85077, attorney for Greyhound Lines, Inc.

PETER S. LOOMIS, Administrative Law Judge:

By orders adopted herein on June 22, 1983, the operation of fares, charges, regulations and classifications stated in schedules contained in Supplement No. 1 and Supplement No. 2 to Tariff DOT-NY No. 69, Greyhound Lines, Inc. was suspended to and including October 28, 1983 and January 28, 1984, respectively, unless otherwise ordered by the Commissioner.

These suspension orders resulted from an application dated May 17, 1983 and filed May 24, 1983, whereby Greyhound Lines, Inc. requested permission to increase its intrastate fares within New York by 40%, in two stages.

A 20% fare increase was to take effect on July 1, 1983, followed by a second 20% increase on October 1, 1983. A public hearing was held in Albany on July 19, 1983 for the purpose of affording Greyhound the opportunity to present further evidence in support of its application, as well as to solicit public opinion. At the hearing, testimony in support of the Greyhound proposal was received from S. David McMichael, a rate analyst employed by Greyhound Lines, Inc. at 1400 West Third Street, Cleveland, Ohio 44101, and who testified generally as to the financial exhibits. One public statement was received from Earl Fraley, 333 South Pearl Street, Albany, N.Y. 12202, who recommended the Department grant Greyhound a 280% fare increase, at the same time precluding it from seeking further relief until June of 1986. The only remaining witness at the hearing was Charles D. Bauer, an Associate Transportation Regulatory Analyst employed by this Department, who testified generally as to the staff recommendation adopted herein on June 22, 1983.

While there was no specific testimony at the hearing concerning the corporate organization of Greyhound it may nonetheless be noted from the records of the Department that Greyhound Lines, Inc. is the bus operating subsidiary of the Greyhound Corporation. Greyhound Lines, Inc. consists of two divisions, the East Division comprising those states east of the Mississippi River. Although the East and West Divisions operate from separate headquarters (Cleveland and San Francisco, respectively), and maintain separate books of accounts, they are not in fact separate corporate entities. With one exception, the financial information submitted herein, however, deals with only the East Division of Greyhound Lines, Inc. or with its New York operations. The sole document which reflects operations conducted throughout both divisions consists of an income statement for Greyhound Lines, Inc. for the three months ended March 31, 1983, and which sets

forth operating revenues for the period of $162,713,000, operating expenses of $183,045,000, with a net loss of $20,332,000, and an operating ratio of 112.50 percent.

While no income statement for the East Division for the same three month period was provided, a system income and expense statement for the East Division reflecting activity for the first five months of 1983 (ended May 31, 1983) reflects operating revenues for the period of $154,824,485, expenses of $168,131,931, with a resultant net operating loss of $13,307,446, and an operating ratio of 108.60 percent. Although these figures therefore result in operating ratios of 112.50 percent for the entire system for the three months ended March 31, 1983 and 108.60 percent for the five months ended May 31, 1983 in the East Division only, a further exhibit submitted reflects that for the 12 months ended April 30, 1983, the East Division's operating ratio was 99.24 percent. This ratio was calculated from total operating revenues for the year of $448,785,501, expenses of $445,281,823 and net operating income of $3,403,678. For the pro forma year ending April 30, 1984, Greyhound projects increased Division revenues in excess of $21,400,000, with an operating ratio of 96.21 percent. It states that while its net operating income in the East Division for the 12 months ended April 30, 1983 was $3,403,678, net operating income for the pro forma year ending April 30, 1984 is calculated at $17,827,840, or in excess of five times its net income for the 12 months ended April 30 of this year. The East Division had operating revenues of $454,261,652 for the year ending December 31, 1982, with expenses of $454,666,860 and an operating ratio of 100.09%. For the pro forma year ended December 31, 1983, it expects net income before taxes of $12,669,717 (as opposed to a loss of $5,581,473 for the comparable 12 months ended December 31, 1982) with an operating ratio of 96.34%.

A New York State income statement for the 12 months ended December 31, 1982, reflects combined interstate and intrastate revenues for the year of $40,689,289, expenses of $35,147,132 with net income before taxes of $5,142,386 and an operating ratio of 86.38%. After pro forma adjustments, the operating ratio for New York combined activity for the year ending December 31, 1983 is calculated at 81.63%.

A New York intrastate income statement for the 12 months ended December 31, 1982, reflects an operating loss for the year of $500,450, based on total operating revenues of $10,390,348, and operating expenses of $10,890,798, with a resultanf operating ratio of 104.82 percent. Because of intrastate fare increases already allowed to Greyhound in both passenger fares and package express rates on April 1, 1982 and December 9, 1982, and in passenger fares on April 11, 1983, however, it is expected that in the pro forma year ending December 31, 1983 it will enjoy additional operating revenues in excess of $2,100,000. This includes an increase in operating assistance from $430,765 in 1982 to an estimated $702,500 in 1983. Accordingly, Greyhound estimates its intrastate revenues for the pro forma year of 1983 to be $12,533,489, with expenses of $11,377,833, assuming increased operating expenses of $487,035. These calculations will produce an intrastate operating ratio of 90.78% for the pro forma year ending on December 31, 1983, without regard to the increases proposed herein.

If the 40% increase Greyhound requests were to have been granted on the two dates proposed, Greyhound estimates that it would enjoy operating income for 1983 of $2,615,081 as opposed to $1,155,656, for an operating ratio of 81.44 percent. The foregoing may be summarized as follows:

	12 Months Ended December 31, 1982	Pro Forma Year Ended December 31, 1983
East Division	100.09%	96.34%
NY (combined)	86.38%	81.63%
NY Intrastate	104.82%	90.78% (based on known factors)
NY Intrastate		81.44% (with relief sought herein)

Although Greyhound was requested to compare its operating revenue for intrastate New York service to the intrastate operating ratios in other states comprising the Eastern Division, it indicates that because of a variety of factors, no such information for a single time frame is generally available. It does acknowledge, however, that the operating ratio of 90.78%, based on known factors, is "somewhat better" than for the entire Division. Even without considering the proposed 40% increase, the New York intrastate figure is also acknowledged as being one of the lowest, if not the single lowest operating ratio within the Division.

The fare increases which Greyhound has received from the Department and from the Interstate Commerce Commission during the last five years are represented in Tables 1 and 2 as follows:

Table 1

Intrastate New York Fare Increases

Effective Date	Amount of Increase
May 1, 1979	7%
April 15, 1980	8%
April 6, 1981	20%
April 1, 1982	9%
December 9, 1982	10%
April 11, 1983	10%
Total	64%

Table 2

Interstate Fare Increase

Effective Date	Amount of Increase
July 30, 1979	4%
Sept. 24, 1979	8
August 14, 1980	9
March 1, 1981	8.5
July 8, 1981	3.8
Sept. 28, 1981	8
July 1, 1982	8
January 1, 1983	2
March 5, 1983	8
Total	59.30%

While Greyhound has received total intrastate fare increases in New York of 64% over the last five years, its interstate fares for the same period have been permitted to increase only 59.30%, or almost 5% less than the increases allowed by this Department. Were Greyhound to be granted the relief sought herein, its intrastate New York fares would be 104% greater than they were in mid 1979.

In its financial justification, Greyhound presented data which indicates that the operating ratio for its Eastern Division has risen from 94.3% in 1979 to 100.9% in 1982. As indicated herein, however, Greyhound also projects that for the pro forma year 1983 the East Division will produce an operating ratio of 96.34% after considering known changes. It also projects that the New York State intrastate operation at current fares will produce an operating ratio of 90.78%, which is therefore almost 6 percentage points below the East Division. If the 40% fare increase is permitted to go into effect, New York intrastate operations will produce an operating ratio of 81.44%, or some 15 percentage points below the East Division's operating ratio.

In connection therewith, if the proposed increase of 40% were computed on an annual basis, it is estimated that over a 12 month period, Greyhound, within New York, would enjoy some $4 million in additional intrastate passenger revenues. Although no New York financial information beyond the pro forma year ending December 31, 1983 has been provided, Department staff nonetheless attempted to determine what effect the proposed 40% increase would have upon Greyhound's operations within the State in 1984. Were the pro forma year to be extended to September 30, 1984, the annual effect of the 40% increase could be measured. In making this calculation, staff concluded that intrastate passenger revenues would then increase by some $4.6 million over the current level, producing total operating revenue for intrastate operations within New York of approximately $16.6 million. The pro forma operating expenses were projected by Greyhound to be $11,377,833 as of December 31, 1983. Staff assumed that a 10% increase in expenses through September 30, 1984 would be reasonable, resulting in an estimated total operating expense for the year ending September 30, 1984 of $12.5 million. The operating ratio which would result from revenues of $16.6 million and $12.5 million in operating expenses would be 75.5 percent. Staff therefore calculate that the "real annual effect of the proposed 40% increase would be to produce an estimated operating ratio in the range of 75.3% and 81.44% for the year ending September 30, 1984."

Greyhound bases its justification for the proposed increases on the Bus Regulatory Reform Act of 1982, and the argument that its intrastate fares within New York are lower than its comparable interstate fares. A sampling for selected city pairs is as follows:

Table 3

Passenger Fare Comparison—Present Intrastate Versus Present Interstate

Between	And	Present One-Way Intrastate Fare	Present One-Way Interstate Fare
Buffalo	Rochester	$6.70	$12.75
Albany	Binghamton	12.50	23.65
Plattsburgh	Syracuse	20.75	38.80
Jamestown	Buffalo	6.60	12.70
Ithaca	Cortland	2.35	4.50

In the proceeding which resulted in the most recent Greyhound intrastate fare increase, i.e. the 10% granted April 1, 1983, there was testimony by the Greyhound Director of Traffic, Henry J. Mitchell, concerning the basis for that earlier application. In that proceeding, Mr. Mitchell emphasized that the most compelling factor which moved Greyhound to seek higher intrastate fare levels was the existence of a wide disparity in revenues expressed on a per mile basis for interstate and intrastate operations. Although a similar exhibit has been offered in the instant proceedings with respect to the intrastate/interstate disparity, there was no independent testimony by any Greyhound witness concerning these matters. As indicated, the only witness presented by Greyhound was S. David McMichael, the rate analyst, who sponsored the exhibits, without offering any independent testimony concerning them or the basis of the application. In any case, the exhibits submitted with respect to the average revenue per passenger mile for the 12 months ended December 31, 1982 indicates New York intrastate revenue per passenger mile of 6.594 cents, as opposed to interstate per passenger mile revenue of 10.058 cents. The same exhibit shows that the intrastate revenue per passenger mile in all of the

other states comprising the Eastern Division had higher revenues per passenger mile level than New York, ranging from a low of 7.330 cents (Missouri) to a high of 12.702 cents (Vermont).

DISCUSSION AND RECOMMENDATION

On May 17, 1983, Greyhound Lines, Inc. requested permission to increase its intrastate fares within New York by 40% in two stages. A 20% fare increase was to take effect on July 1, 1983, followed by a subsequent 20% increase on October 1, 1983. The net effect of the proposed increases would be to produce, for the pro forma year ending December 31, 1983, an estimated New York intrastate operating ratio of 81.44%. Based upon the most recent fare increases which Greyhound has received, without considering the effect of the proposed increases, it is estimated that Greyhound's operating ratio for intrastate New York operations for the year ending December 31, 1983 will be 90.78%. By the end of calendar year 1983, therefore, if the proposed increases were to be granted, Greyhound would enjoy an additional 9% profit. If the proposed increases are annualized, Department staff estimates that Greyhound's New York intrastate operating ratio for a pro forma year extended to September 30, 1984 would range between 75.3% and 81.44%, or a 20 to 25% profit margin.

The justification for Greyhound's application lies in the fact that its revenues per passenger mile for intrastate New York operations are less than those for New York interstate operations. Although Greyhound has been granted New York intrastate fare increases of some 64% over the last five years, and interstate fare increases for a comparable period of 59.30%, it has presented an exhibit which indicates that its New York intrastate revenue per passenger mile is somewhat less than the interstate revenue per passenger mile. At the same time Greyhound acknowl-

edges that its intrastate operations within New York are perhaps the most profitable of any intrastate operations conducted within the East Division, which constitutes all of those states east of the Mississippi River.

Greyhound justifies its request by pointing to the provisions of the Bus Regulatory Reform Act of 1982. 49 USC 11501(e) provides essentially that the Interstate Commerce Commission may preempt a State regulatory decision with respect to the rates of interstate motor carriers if the ICC finds that the rate, rule or practice in effect causes an unreasonable discrimination against or imposes an unreasonable burden on interstate commerce. For the purposes of determining whether such a burden exists, there is a rebuttable presumption that any rate, rule or practice results in the carrier charging a rate for such transportation which is lower than the rate such carrier charges for comparable interstate transportation of passengers.

In connection with this argument, there is no question but that Greyhound's present intrastate fares within New York are less than its interstate fares for transportation between the same points. At the same time, however, there is also little question but that Greyhound's present operations within this State are profitable and that they would be even more profitable if the increases sought herein were to be granted. Greyhound presently is expected to enjoy an operating ratio as of December 31, 1983 of 90.78% for intrastate operations within New York, and by December 31, 1983, if the increases sought herein had gone into effect on the dates proposed its operating ratio for intrastate New York operations would be an even more enviable 81.44%.

While acknowledging that its New York intrastate operations are among the most profitable of any in the East Division, Greyhound nonetheless urges that it is entitled to relief simply because the intrastate fares which produce this ratio are in any case lower than the interstate fare

levels. As was indicated, within the last five years Greyhound has received intrastate rate increases of 64%. Twenty percent of that amount was granted since December 9, 1982. As to the impact of these fare increases of 64% on the intrastate passenger, staff has noted that such a passenger travelling between Albany and Buffalo paid a fare of $13.95 in March of 1981 and presently pays $21.90. Were the proposals sought herein to become effective, this same passenger would pay $30.65 in October of 1983. This would result in a fare increase of 120% in only 30 months. As was stated in the staff report adopted herein on June 22, 1983, "it would appear that Greyhound is trying unjustly to strengthen its Eastern Division's profits at the expense of the New York intrastate passenger, under the guise of the Bus Regulatory Reform Act. While it is evident that intrastate fares are somewhat lower than interstate fares on a fare per mile basis, it is also evident that these same intrastate fares are yielding an operating ratio of 90.78% after considering passenger loads and total operating costs."

There is little question but that intrastate passengers within New York are contributing a greater share than are those in the rest of the Division to the company's profits. Inasmuch as Greyhound appears to be operating at a more profitable level intrastate in New York than it is in most, if not all of the remaining states of the East Division, it would appear that these other states would be more appropriate areas for rate relief. One of the purposes of the Bus Regulatory Reform Act is to ameloriate situations where State regulatory bodies have denied or delayed adequate intrastate rate relief such that the interstate carriers have been forced to raise rates on other routes to compensate for intrastate deficiencies or to cut back on overall service. In this particular instance, the State of New York has granted Greyhound rate relief of 64% within the last five years. Twenty percent of that relief was

granted within the last year. During the same period the ICC has permitted Greyhound fare increases of only 59.30%.

In the Greyhound rate application which resulted in the 10% increase of April 1, 1983, there was testimony by the Greyhound representative as to what constituted an acceptable operating ratio. It was indicated at that time that although an operating ratio in the "90's" would be considered low, a ratio in the "80's" would be at an acceptable level. There was no comparable testimony with respect to the proceedings herein, although it may be assumed that were the director of traffic to have testified, his opinion would not have changed.

Applying the operating ratios set forth previously to the opinion offered by Greyhound in the earlier rate proceeding (Case 29927), it may be observed that while the East Division may have an operating ratio (96.34%) which is, in Greyhound's view, in need of improvement, the New York combined (81.63) would be "acceptable" and the New York intrastate (90.78%) would be at the threshold of acceptability. New York combined operations will yield at profit to Greyhound in the pro forma year of close to 20%, while the intrastate New York operations alone yield approximately 10%. Given these calculations, it cannot be concluded that the record is supportive of any rate increase at this time, and it is accordingly recommended that the tariff supplements under suspension be cancelled and that the rate relief sought herein be denied.

August 31, 1983

/s/ P. S. Loomis

PSL:md

STATE OF NEW YORK
DEPARTMENT OF TRANSPORTATION
ALBANY, N.Y. 12232

James L. Larocca
Commissioner

At the Office of the Department
of Transportation in the City
of Albany on September 13, 1983

PRESENT:
Edward J. Canty, Director,
Regulation Division

CASE 30032—Proceeding on motion of the Department as to increased fares proposed by Greyhound Lines, Inc.

• • •

By order adopted June 22, 1983 herein the Department having suspended the operations of fares, regulations and classifications stated in schedules Supplement 1 to D.O.T.-N.Y. No. 69 and having ordered an investigation into said fares, regulations and classifications, and public hearing after due notice having been held, and it having been determined that suspension should be terminated and that the fares, regulations and schedules stated in said supplement should be cancelled, it is

ORDERED:

1. That Greyhound Lines, Inc. file within five days of date of receipt of this order a supplement cancelling the matter under suspension and the supplement announcing the suspension thereof.

2. That upon receipt of said supplement cancelling Supplement 1 to D.O.T.-N.Y. No. 69, this proceeding be closed.

By the Director, Regulation Division
/s/ THOMAS B. TYREE
Thomas B. Tyree
Transportation Executive Officer

PSL:md

STATE OF NEW YORK
DEPARTMENT OF TRANSPORTATION
ALBANY, N.Y. 12232

James L. Larocca
Commissioner

At the Office of the Department
of Transportation in the City
of Albany on September 13, 1983

PRESENT:
Edward J. Canty, Director,
Regulation Division

CASE 30033—Proceeding on motion of the Department as to increased fares proposed by Greyhound Lines, Inc.

• • •

By order adopted June 22, 1983 herein the Department having suspended the operations of fares, regulations and classifications stated in schedules Supplement 2 to D.O.T.-N.Y. No. 69, and having ordered an investigation into said fares, regulations and classifications, and public hearing after due notice having been held, and it having been determined that suspension should be terminated and that the fares, regulations and schedules stated in said supplement should be cancelled, it is

ORDERED:

1. That Greyhound Lines, Inc. file within five days of date of receipt of this order a supplement cancelling the matter under suspension and the supplement announcing the suspension thereof.

2. That upon receipt of said supplement cancelling Supplement 2 to D.O.T.-N.Y. No. 69, this proceeding be closed.

By the Director, Regulation Division
/s/ THOMAS B. TYREE
Thomas B. Tyree
Transportation Executive Officer

PSL:md

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of September one thousand nine hundred and eighty-four.

Present: HON. AMALYA L. KEARSE
HON. LAWRENCE W. PIERCE,
HON. HOWARD T. MARKEY,*
Circuit Judges,

84-4017

THE COMMISSIONER OF TRANSPORTATION OF THE STATE OF NEW YORK,

Petitioner,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

A petition for review of an order of the Interstate Commerce Commission,

This cause came to be heard on the certified list of items comprising the record of the Interstate Commerce Commission and was argued by counsel,

UPON CONSIDERATION THEREOF, it is ordered, adjudged and decreed that the order be and it hereby is affirmed with costs to be taxed against the petitioner.

Elaine B. Goldsmith
Clerk
/s/ EDWARD J. GUARDARO
By: Edward J. Guardaro,
Deputy Clerk

---

* Chief Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-433

COMMISSIONER OF TRANSPORTATION OF NEW YORK
Petitioner,

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 14, 1985.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme Court of the United States

Dated this 6th
day of December, 1984.

APPENDIX F

Analysis of ICC Preemption of State Regulation of Intrastate Bus Rates Pursuant to 49 U.S.C. 11051(e)

ICC DOCKET AND DECISION DATE	STATE	% PASSENGER RATE INCREASE PRESCRIBED BY ICC	REASONS FOR ACTION (See pages 45a-47a for explanation of notes and asterisks)
MC-C-10842 April 14, 1983	North Carolina	20.0%	Note 1
MC-C-10844 April 25, 1983	Missouri	27%	Note 1
MC-C-10848 May 6, 1983	Massachusetts	Dismissed	Note 6
MC-C-10851 May 20, 1983	Missouri	Dismissed	Note 6
MC-C-10852 May 20, 1983	Illinois	20%	Note 1
MC-C-10853 June 1, 1983	Massachusetts	20%	Note 1
MC-C-10855 June 30, 1983	Georgia	20%	Note 1
MC-C-10856 January 3, 1984	Missouri	32.25%	Note 4
MC-C-10857 November 18, 1983	Missouri	35%	Note 4*
MC-C-10858 August 2, 1983	Arkansas	25%	Note 5
MC-C-10859 August 11, 1983	Massachusetts	15%	Note 5

ICC DOCKET AND DECISION DATE	STATE	% PASSENGER RATE INCREASE PRESCRIBED BY ICC	REASONS FOR ACTION (See pages 45a-47a for explanation of notes and asterisks)
MC-C-10862 August 26, 1983	Tennessee	25%	Note 1
MC-C-10863 August 25, 1983	Oregon	20%	Note 1
MC-C-10866 September 9, 1983	California	15%	Note 1
MC-C-10869 September 21, 1983	Louisiana	20%-35%	Note 5
MC-C-10870 October 4, 1983	Louisiana	17.9%	Note 5
MC-C-10871 October 5, 1983	Washington	20%	Note 5
MC-C-10872 October 5, 1983	Arkansas	25%	Note 5
MC-C-10877 November 18, 1983	Tennessee	25%	Note 1
MC-C-10879 November 30, 1983	Kansas	20%	Note 1*
MC-C-10885 December 8, 1983	New York	40%	Note 1*
MC-C-10886 December 6, 1983	Rhode Island	16%	Note 5
MC-C-10887 December 21, 1983	Massachusetts	Unspecified	Note 1
MC-C-10891 January 27, 1984	Texas	15%	Note 2*

ICC DOCKET AND DECISION DATE	STATE	% PASSENGER RATE INCREASE PRESCRIBED BY ICC	REASONS FOR ACTION (See pages 45a-47a for explanation of notes and asterisks)
MC-C-10893 August 10, 1984	Texas	15%	Note 2*
MC-C-10895 February 28, 1984	Massachusetts	Unspecified	Note 5
MC-C-10898 March 8, 1984	Kansas	20%	Note 1*
MC-C-10899 March 15, 1984	Massachusetts	25%	Note 4
MC-C-10901 April 13, 1984	West Virginia	14.8%	Note 3*
MC-C-10904 May 16, 1984	Alabama	20%	Note 3*
MC-C-10906 May 17, 1984	Louisiana	25%	Note 1
MC-C-10908 May 31, 1984	Massachusetts	Unspecified	Note 5
MC-C-10909 November 9, 1984	Texas	10%	Note 7
MC-C-10910 June 6, 1984	Nebraska	25%	Note 5
MC-C-10913 June 21, 1984	Pennsylvania	15%	Note 3
MC-C-10915 June 19, 1984	Nebraska	Unspecified	Note 5
MC-C-10916 June 22, 1984	Tennessee	25%	Note 3

ICC DOCKET AND DECISION DATE	STATE	% PASSENGER RATE INCREASE PRESCRIBED BY ICC	REASONS FOR ACTION (See pages 45a-47a for explanation of notes and asterisks)
MC-C-10918 July 5, 1984	North Carolina	20%	Note 3
MC-C-10921 July 20, 1984	Ohio	22%	Note 5
MC-C-10933 November 15, 1984	Nebraska	Unspecified	Note 5
MC-C-10934 November 8, 1984	Kansas	18.3%	Note 5
MC-C-10935 November 15, 1984	Tennessee	36.5%	Note 3
MC-C-10936 November 14, 1984	North Carolina	32.3%	Note 3
MC-C-10937 November 13, 1984	Alabama	35.7%	Note 3*
MC-C-10940 December 10, 1984	Georgia	17.5%	Note 3

Explanation of Notes and Asterisks

Note 1. Evidence that existing intrastate rates are profitable is not probative.

Note 2. Evidence that intrastate revenues per passenger mile exceeded interstate revenues per passenger mile is not probative.

Note 3. The allocation of costs between intrastate and interstate operations is unreliable and arbitrary.

Note 4. Evidence that interstate rates are unreasonably high is not probative.

Note 5. State adduced no evidence to rebut the presumption.

Note 6. Petition dismissed by ICC on procedural grounds.

Note 7. State unsuccessfully contended that there was no disparity and that, therefore, the presumption did not arise, but adduced no evidence to rebut the presumption.

* MC-C-10857 pending judicial review in United States Court of Appeals for the 8th Circuit in No. 84-1036, *Missouri Public Service Commission* v. *U.S.*

* MC-C-10879 pending judicial review in the United States Court of Appeals for the 10th Circuit in No. 84-1426, *State Corporation Commission of the State of Kansas* v. *I.C.C.*

* MC-C-10885 affirmed September 18, 1984, by the United States Court of Appeals for the 2nd Circuit in No. 84-4017, *The Commissioner of Transportation of the State of New York* v. *U.S. & I.C.C.*

* MC-C-10891 pending judicial review in the United States Court of Appeals for the 5th Circuit in No. 84-4184, *State of Texas* v. *U.S.*

* MC-C-10893 pending judicial review in the United States Court of Appeals for the 5th Circuit in No. 84-4249, *State of Texas* v. *U.S.*

* MC-C-10898 pending judicial review in the United States Court of Appeals for the 10th Circuit in No. 84-2489, *State Corporation Commission of the State of Kansas* v. *I.C.C.*

* MC-C-10901 affirmed by the United States Court of Appeals for the 4th Circuit in unpublished *per curiam* opinion entered November 19, 1984 in No. 84-1437, *Public Service Commission of West Virginia* v. *I.C.C.*

• MC-C-10904 pending judicial review in the United States Court of Appeals for the 11th Circuit in No. 84-7374, *Alabama Public Service Commission* v. *U.S.*

• MC-C-10937 pending judicial review in the United States Court of Appeals for the 11th Circuit in No. 84-7782, *Alabama Public Service Commission* v. *U.S.*

Office - Supreme Court, U.S.
FILED
MAR 14 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE COMMISSIONER OF TRANSPORTATION
OF THE STATE OF NEW YORK,
Petitioner,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
and GREYHOUND LINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT GREYHOUND LINES, INC.

E. BARRETT PRETTYMAN, JR.*
JAMES G. MIDDLEBROOKS
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685

LAT J. CELMINS
1742 Greyhound Tower
Phoenix, Arizona 85077
(602) 248-2942

Attorneys for
Greyhound Lines, Inc.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Second Circuit was correct in ruling that the Interstate Commerce Commission acted neither arbitrarily nor capriciously in holding that Petitioner had failed to rebut the statutory presumption that Greyhound's intrastate fares constituted an unreasonable burden on interstate commerce.

STATEMENT REQUIRED BY RULE 28.1

Respondent Greyhound Lines, Inc., is a wholly-owned subsidiary of The Greyhound Corporation. A list of the principal subsidiaries of The Greyhound Corporation and the subsidiaries and affiliates of Greyhound Lines, Inc., appears in an Appendix hereto.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT REQUIRED BY RULE 28.1	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
APPENDIX	1a

TABLE OF AUTHORITIES

Cases Page

Alabama Public Service Comm'n v. *ICC*, No. 84-7374 (11th Cir. Feb. 22, 1985) 5
Chicago, Milwaukee, St. P. & P.R. Co. v. *Illinois*, 355 U.S. 300 (1958) 5
Florida v. *United States*, 282 U.S. 194 (1931) 5
Miller v. *Youakim*, 440 U.S. 125 (1979) 4
North Carolina v. *United States*, 325 U.S. 507 (1945) 5
Public Service Comm'n of Utah v. *United States*, 356 U.S. 421 (1958) 5
Public Service Comm'n of West Virginia v. *ICC*, No. 84-1437 (4th Cir. Nov. 16, 1984) 5
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 4

Statutes

5 U.S.C. § 706(2)(A) 4
49 U.S.C. § 13(4) 4
Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (codified in part at 49 U.S.C. § 11501(e)) ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1135

THE COMMISSIONER OF TRANSPORTATION
OF THE STATE OF NEW YORK,
Petitioner,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
and GREYHOUND LINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT GREYHOUND LINES, INC.

STATEMENT OF THE CASE

In May 1983, Respondent Greyhound Lines, Inc. ("Greyhound"), requested an increase in intrastate passenger fares from Petitioner Commissioner of the New York State Department of Transportation (hereinafter "NYDOT"). NYDOT suspended the proposed increase and conducted a hearing on Greyhound's request. At the

hearing, Greyhound produced conclusive and unrebutted evidence that its intrastate fares in New York were less than its interstate fares for transportation between the same points.

Despite this disparity in rates, a New York Administrative Law Judge denied Greyhound's proposed increase because he concluded that Greyhound's New York operations were profitable. Pet. App. 26a-37a. Greyhound appealed this decision to the Interstate Commerce Commission ("ICC" or "Commission").

The Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (codified in part at 49 U.S.C. § 11501(e)(2)(A)(i)), presumes a burden on interstate commerce where, *inter alia*, intrastate rates are lower than the interstate rates for comparable transportation. Greyhound invoked this statutory presumption, thus shifting the burden of proof to NYDOT to rebut this presumption. Before the ICC, NYDOT offered four contentions in rebuttal: (1) the NYDOT's ruling was reasonable; (2) significant differences between intra- and interstate operations justified the rate disparity; (3) Greyhound enjoyed a monopoly in many areas of New York; and (4) NYDOT subsidized certain Greyhound routes.

After hearing evidence from both sides, the Commission rejected each of NYDOT's arguments. The ICC held that, even with the proposed rate increase, Greyhound's intrastate rates were lower than the interstate rates for comparable travel in New York. It ruled that NYDOT's proffered evidence was insufficient to rebut the statutory presumption of an unreasonable burden and therefore that NYDOT's ruling was *not* reasonable. The rate disparity, according to the Commission, was not justified because the record did not support any differences in operating conditions or cost of service. NYDOT's assertion that Greyhound enjoyed a monopoly on certain routes was "simply not on point." Pet. App. 24a. This was ob-

viously because Greyhound experienced substantial competition on every one of its major New York routes, and those few routes without direct bus competition were "marginal at best." Pet. App. 23a. Finally, that NYDOT subsidized certain low revenue routes was insufficient for two reasons: (i) the subsidy was merely temporary; and (ii) even with the subsidy included, a significant rate disparity still existed. Pet. App. 24a. Accordingly, the ICC granted Greyhound's proposed rate increase.

NYDOT appealed the Commission's decision to the Second Circuit, which concluded that the Commission's interpretation of Section 11501(e) and its decision were reasonable. NYDOT now petitions this Court for a writ of certiorari.

REASONS FOR DENYING THE WRIT

This case, even in its pristine form, presents narrow issues reasonably decided by the Second Circuit without dissent and with no conflicting view from any other Circuit. But its resolution here is made even easier by Petitioner's concessions and the issue Petitioner has abandoned:

1. Petitioner does not challenge the resolution of the principal issue decided by the ICC and the Second Circuit. *See* Pet. at 9 n.2.[1]

2. Petitioner conceded in the Court of Appeals[2] that the correct standard of judicial review to be applied to

---

[1] That issue was whether the ICC must find the existence of *both* one of the three criteria in Subsection 11501(e)(2)(A) *and* the criterion in Subsection 11501(e)(2)(B). Pet. App. 6a-12a.

[2] The "Brief for Petitioner State of New York" filed in the Second Circuit conceded both in its "Summary of Issues for Review" (p. iv) and in the body of its argument (pp. 19-20) that the issue was whether the ICC's decision was "arbitrary and capricious."

the Commission's interpretation of Section 11501(e) and its decision in this case is the deferential arbitrary and capricious standard set forth in 5 U.S.C. § 706(2)(A). *See generally Miller* v. *Youakim*, 440 U.S. 125, 145 n.25 (1979) (agency's interpretation " 'should be followed unless there are compelling indications that it is wrong' ") (quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969)).

3. Petitioner argues that former Section 13(4) of the Interstate Commerce Act, former 49 U.S.C. § 13(4), is applicable here. Pet. at 13. But under that Section, the burden of proof rested on the rail carrier, and Petitioner concedes that the burden of proof is entirely different under the Bus Act. Pet. at 16; *see also id.* at 6. The Bus Act creates a rebuttable presumption that interstate commerce is unreasonably burdened whenever intrastate rates are lower than their interstate counterparts.

4. Petitioner argues that primary authority for setting intrastate rates rests with the States, but he then concedes that the ICC can overturn a State's decision *on a case-by-case basis* whenever those rates constitute an unreasonable burden on interstate commerce. Pet. at 14, 16.

In light of what Petitioner does not argue and his concessions—which are mandated by the Bus Act itself—this case comes down simply to whether the ICC, in this particular set of circumstances, correctly decided that NYDOT failed to rebut the statutory presumption that Greyhound's intrastate rates unreasonably burdened interstate commerce because they were lower than the interstate fares for comparable transportation.

Petitioner's recitation (Pet. at 11-12) of the rate decisions coming before the Commission—even if accurate [3]

---

[3] Petitioner has greatly over-simplified the factual and legal circumstances underlying those decisions.

—does not prove that the Commission is arbitrarily increasing intrastate rates merely because they are lower than interstate fares. Quite the contrary. Petitioner's own recitation reveals that different factual and legal analyses have gone into each decision.

Petitioner's only decisional authority consists of four cases interpreting an entirely different statute, all decided between 1931 and 1958: *Public Service Comm'n of Utah* v. *United States*, 356 U.S. 421 (1958); *Chicago, Milwaukee, St. P. & P.R. Co.* v. *Illinois*, 355 U.S. 300 (1958); *North Carolina* v. *United States*, 325 U.S. 507 (1945); and *Florida* v. *United States*, 282 U.S. 194 (1931). This reliance is simply inexplicable in light of NYDOT's concession, noted above, that the burden of proof has entirely shifted to the Petitioner under the Bus Regulatory Reform Act of 1982.

Two other Circuits have interpreted § 11501(e) and have followed the Second Circuit's ruling in favor of the ICC's construction of the statute. *Alabama Public Service Comm'n* v. *ICC*, No. 84-7374 (11th Cir. Feb. 22, 1985) (summary affirmance of ICC's decision); *Public Service Comm'n of West Virginia* v. *ICC*, No. 84-1437 (4th Cir. Nov. 16, 1984) (unpublished decision). This consensus among the lower courts further demonstrates that this case presents no questions deserving this Court's review.

At bottom, Petitioner's argument is that Greyhound's intrastate New York operations were more profitable than its Eastern Division's operations, as shown by its operating ratios, and th[illegible]he Second Circuit was wrong in concluding that these operating ratios were not a reliable guide to profitability because of the difficulty of allocating a portion of total expenses to Greyhound's intrastate operations.

Without exploring the ways in which Petitioner is simply *wrong* in his factual analyses, suffice it to say this is hardly an issue that merits this Court's attention.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.*
JAMES G. MIDDLEBROOKS
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685

LAT J. CELMINS
1742 Greyhound Tower
Phoenix, Arizona 85077
(602) 248-2942

Attorneys for
Greyhound Lines, Inc.

* Counsel of Record

APPENDIX

APPENDIX

LIST OF PRINCIPAL SUBSIDIARIES OF THE GREYHOUND CORPORATION (ARIZONA) AND SUBSIDIARIES AND AFFILIATES OF GREYHOUND LINES, INC. (CALIFORNIA)

Parent-subsidiary or affiliate relationships are shown by marginal indentation. State, province or country of incorporation and ownership percentage are shown in parentheses following each name, except that no ownership percentage appears for 100 percent owned subsidiaries. If ownership is divided between two affiliates, the ownership percentage of both is combined and is not in parentheses, and in such cases the company is listed as a subsidiary or affiliate of the company holding the highest percentage of stock. The list does not include companies in which the direct or indirect interest of The Greyhound Corporation is less than 20 percent.

TRANSPORTATION GROUP

GREYHOUND LINES, INC. (California)

Atlantic Greyhound Lines of Virginia, Inc. (Virginia)
California Parlor Car Tours Company (California)
Greyhound Bus Depot of Atlanta, Inc. (Georgia) (87%)
Greyhound de Mexico, S.A. de C.V. (Mexico)
Greyhound Lines of Canada Ltd. (Canada) (68%)
Brewster Transport Company Limited (Alberta)
Columbia Icefield Snowmobile Tours Ltd. (Alberta)
Coachways Systems Ltd. (Alberta)
Alaskan Coachways Limited (Alaska)
Canadian Coachways (Alberta) Limited (Alberta)
Eastern Canadian Greyhound Lines, Limited (Ontario)
Motor Coach Industries Limited (Manitoba)
Frank Fair Industries Ltd. (Manitoba)

Greyhound-Taseco Saudi Arabia Ltd. (Saudi Arabia) (40%)
Greyhound World Tours, Inc. (Arizona)
Greyhound World Travel B.V. (Netherlands)
Greyhound World Travel A.G. (Switzerland)
Greyhound World Travel BmbH (Austria)
Greyhound World Travel GmbH (Germany)
Greyhound World Travel Limited (United Kingdom)
Greyhound World Travel S.A.R.L. (France)
Jefferson Lines Holding Company (Minnesota) (40%)
Jefferson Lines, Inc. (Minnesota)
Jefferson Services, Inc. (Minnesota)
Midland Lines, Inc. (Minnesota)
Kerrville Bus Company, Inc. (Texas) (40%)
Kerrville Tours, Inc. (Texas)
Painter Bus Lines, Inc. (Texas)
Union Bus Center of San Angelo, Inc. (Texas)
Southern Stages, Inc. (Georgia) (40%)
Springfield Bus Terminal Corporation (Massachusetts) (32%)
Union Bus Station of Oklahoma City, Oklahoma (Oklahoma) (20%)
WGL Properties, Inc. (Delaware)
Wilmington Union Bus Station Corporation (North Carolina) (25%)
Texas, New Mexico & Oklahoma Coaches, Inc (98%)
Vermont Transit Co., Inc.

BUS MANUFACTURING GROUP

Motor Coach Industries, Inc.
Motor Coach Industries Limited (68%)
Transportation Manufacturing Corporation
Universal Coach Parts, Inc.

FOOD SERVICE GROUP

Faber Enterprises, Inc.
Glacier Park, Inc. (80%)

Greyhound Food Management, Inc.
Greyhound Support Services, Inc.

CONSUMER PRODUCTS GROUP

Armour-Dial, Inc.
Armour Handcrafts, Inc.
Armour International Company

FINANCIAL GROUP

Greyhound Computer Corporation
Greyhound Financial & Leasing Corporation AG (65%)
Greyhound Leasing & Financial Corporation
Greyhound Realty Corporation
MCI Acceptance Corp.
Pine Top Insurance Company
Pipe Top Insurance Company Limited (U.K.)
Travelers Express Company, Inc.
Verex Corporation

SERVICES GROUP

Aircraft Service International, Inc.
Consultants & Designers Inc.
Dispatch Services, Inc.
Florida Export Tobacco Co. Inc.
Greyhound Exhibitgroup Inc.
Greyhound Exposition Services, Inc.
Greyhound Temporary Personnel, Inc.

Office - Supreme Court, U.S.
FILED
MAR 15 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE COMMISSIONER OF TRANSPORTATION OF THE STATE OF NEW YORK,
Petitioner,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE SUPPORTING PETITION FOR CERTIORARI

*WILLIAM PAUL RODGERS, JR.
General Counsel

CHARLES D. GRAY
Assistant General Counsel

GENEVIEVE MORRELLI
Deputy Assistant General Counsel

National Association of Regulatory Utility Commissioners
1102 ICC Building
Post Office Box 684
Washington, D.C. 20044
(202) 628-7324
Counsel for Amicus Curiae

Dated: March 15, 1985

(*Counsel of Record)

CASILLAS PRESS INC. - 1717 K STREET NW WASHINGTON DC - 223-1220

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

CERTIORARI SHOULD BE GRANTED TO REVIEW THE LOWER COURT'S DECISION CONFLICTING WITH THIS COURT'S DECISION IN *NORTH CAROLINA V. UNITED STATES* 4

CONCLUSION 9

TABLE OF AUTHORITIES

Cases: Page

Carolina, C. & O. Ry. Co. v. FCC,
593 F.2d 1303 (D.C. Cir. 1979) 6, 7, 8

Florida v. United States,
292 U.S. 1 (1934) 8

Houston, E. & W. T. R. Co. v. United States
235 U.S. 342 (1914) 5

North Carolina v. United States,
325 U.S. 507 (1945) 3, 6, 7, 8, 9
Public Service Commission v. United States,
356 U.S. 421 (1958) 8

Statutes:

Administrative Procedures Act,
5 U.S.C. §706 (1977) 9

The Bus Regulatory Reform Act of 1982,
Pub. L. 97-261, 96 Stat. 1102 (1982) 2, 3
Section 17 ..... 2, 3

The Interstate Commerce Act:
49 U.S.C. §10521(b) (Supp. 1981) 4
49 U.S.C. §11501(a) (Supp. 1979) 6
49 U.S.C. §11501(e) (Supp. 1983) 4, 7, 8
49 U.S.C. §11501(e)(1)(B) (Supp. 1983) 5, 8

The Staggers Rail Act of 1980,
Pub. L. 96-448, 94 Stat. 1913 (1980) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1135

THE COMMISSIONER OF TRANSPORTATION OF THE STATE OF NEW YORK,

Petitioner,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE SUPPORTING PETITION FOR CERTIORARI

The National Association of Regulatory Utility Commissioners hereby submits its brief as *amicus curiae* in support of the petition for certiorari filed by the Commissioner of Transportation of the State of New York seeking review of the decision of the United States Court of Appeals for the Second Circuit in *Commissioner of Transportation v. United States*, 750 F.2d 163 (2d Cir. 1984) (attached as Appendix A to the Petition for Certiorari filed herein). Pursuant to Rule 36 of this Court, the written consents of the parties have been obtained and filed with the Clerk.

INTEREST OF AMICUS CURIAE

The National Association of Regulatory Utility Commissioners (NARUC) is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of utilities and carriers. The New York State Department of Transportation (NY DOT) is a member of the NARUC. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating motor carriers within their respective borders. As such, these officials have the obligation to assure the establishment of motor carrier services and facilities as may be required by the public convenience and necessity, and the furnishing of dependable service at rates that are just and reasonable. The State regulatory commissions are the creatures of their respective legislature, established to regulate carriers operating within their respective jurisdictions.

The decision of the Court of Appeals for which petitioner seeks review affirmed a decision of the Interstate Commerce Commission (ICC of the Commission) preempting an order of the NY DOT which denied Greyhound Lines, Inc. the authority to increase passenger fares over intrastate routes in the State of New York. (The ICC's decision is attached as Appendix B to the Petition for Certiorari). Acting pursuant to the recently-enacted section 17 of the Bus Regulatory Reform Act of 1982 [codified at 49 U.S.C. § 11501(e) (Supp. 1983)], the ICC authorized the carrier to increase its intrastate fares by 40

percent despite previous findings of the NY DOT after notice, hearing and investigation, that such higher fares were not in the public interest. (The NY DOT's decision is attached as Appendix C to the Petition for Certiorari.)

In affirming the Commission, the Court of Appeals held that the ICC's decisions regarding intrastate bus fares need not meet the heightened standard of review required by this Court's decision in *North Carolina v. United States*, 325 U.S. 507 (1945) concerning intrastate rail rates. Because the statutory authority for the ICC's preemption decisions under section 11501(e) is virtually identical to the statute employed in *North Carolina* the NARUC is vitally concerned that the Court of Appeals' decision will permit the ICC to preempt State bus decisionmaking without the necessary care and certainty required in the rail area. Because the ICC frequently and consistently preempts State bus fare decisions (see Appendix F to the Petition for Certiorari) without meeting the *North Carolina* test, the fare orders of each member of the NARUC with jurisdiction over bus regulation are threatened by the Court of Appeals' decision.

SUMMARY OF ARGUMENT

The issue presented the Court in ths case which is of greatest concern to *amicus* NARUC is whether the standard of judicial review described by this Court in *North Carolina v. United States,* 325 U.S. 507 (1945) shall apply to the ICC's decision preempting State ratemaking decisions under Section 17 of the Bus Regulatory Reform Act of 1982, Pub. L. 97-261, 96 Stat. 1102 *et. seq.* (1982) (the Bus Act.).[1] In *North Carolina*, the Court held that ICC

[1]Section 17 of the Bus Act is codified at 49 U.S.C. § 11501(e) (Supp. 1983). All subsequent references to section 17 shall be to this U.S. Code Citation.

decisions preempting State rail rate decisions "must meet 'a high standard of certainty' " in which the "justification for the 'exercise of the federal power must clearly appear'." 325 U.S. at 511. Because the ICC's authority to preempt State bus fare decisions under 49 U.S.C. § 11501(e) is virtually identical to the statutory scheme under review in *North Carolina,* this vigorous standard must also apply in the intrastate bus area.

On this issue of first impression, the Court of Appeals rejected arguments that *North Carolina* was applicable to the Commission's decision to preempt the NY DOT. Because the basic reasons for the exercise of the federal power in the field of intrastate bus regulation are the same in the area of rail regulation, and because the statutory authority with regard to these two transportation modes are so similar, this rejection of *North Carolina* is error. Due to the dire impact the Court of Appeals' appeal will have on all State bus decisionmaking, this Court should grant the Petition for Certiorari and then reverse.

ARGUMENT

Certiorari Should be Granted to Review the Lower Court's Decision Conflicting with This Court's Decision in North Carolina v. United States.

Prior to the 1982 enactment of the Bus Act, the jurisdiction of the Commission to regulate the rates of motor carriers of passengers extended only to the interstate operations of such carriers. Under 49 U.S.C. sec. 10521(b) (Supp. 1981), the ICC was specifically and explicitly denied authority, *inter alia*, to interfere in State regulation of intrastate motor carrier matters. 49 U.S.C. § 11501(e) (Supp. 1983) altered this bright line between State and Federal jurisdiction by authorizing the ICC to act in this

area of regulation. Specifically, Congress directed the ICC to grant a carrier the authority to increase intrastate fares when the ICC determines *inter alia*, "that the rate, rule or practice in effect and applicable to such intrastate transportation causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce." 49 U.S.C. § 11501(e)(1)(B) (Supp. 1983).

This legal test for the exercise of the ICC's intrastate fare setting authority ("the unreasonable burden on interstate commerce standard") is the jurisdictional test established by the United States Supreme Court in its so-called *Shreveport* decision. *Houston E. & W. T.R. Co. v. United States,* 235 U.S. 342 (1914). In *Shreveport*, the Court held that the authority of Congress to regulate interstate railroad commerce under the Constitution necessarily includes the power to regulate intrastate transactions which unduly burden, discriminate against or otherwise harm interstate activities:

> Wherever the interstate and interstate transactions of carriers are so related that the government of one involves the control of the other, it is Congress, and not the States, that is entitled to prescribe the final dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the States and not the nation, would be supreme within the national field.
>
> 234 U.S. at 351-352.

This principal – that Congress, through its agent, the ICC, could regulate those intrastate activities which harmed interstate commerce – governed ICC jurisdiction over intrastate rail matters for over 60 years, until the enact-

ment of the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1913 (1980).[2]

In *Shreveport,* however, the Supreme Court was careful to note that its decision did not grant the ICC plenary authority to regulate intrastate commerce in the absence of a finding of unduly burdensome or discriminatory intrastate practices. 234 U.S. at 357. Indeed, in a later decision, this Court revisited its *Shreveport* decision, holding that the power of the ICC to interfere in intrastate matters should not be lightly exercised. In *North Carolina v. United States,* 25 U.S. 507 (1945), the Court stated in the context of an intrastate rail rate dispute that "a State's power over intrastate rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by [the *Shreveport* doctrine]." 325 U.S. at 511. More specifically, the the Court went on to hold that:

> Intrastate transportation is primarily the concern of the State . . . A scrupulous regard for maintaining the power of the State in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet "a high standard of certainty" . . . Before the Commission can nullify a State rate, justification for the "exercise of the federal power must clearly appear" . . . And the intention to interfere with the State's ratemaking function is not to be presumed . . . nor must

---

[2]Prior to the Staggers Act, Congress had codified the *Shreveport* doctrine. See 49 U.S.C. sec. 11501(a) (Supp. 1979). The District of Columbia Circuit has ably described the history and requirements of ICC preemption in the pre-Staggers period. *Carolina, C. & O Ry. v. ICC,* 593 F.2d 1305 (D.C. Cir. 1979).

> its intention in this respect be left in serious doubt . . . .
>
> 325 U.S. at 511.
> (Citations omitted)

The Court also held that the ICC may not exercise its *Shreveport* power to supplant State regulation of intrastate carriers "unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission." *Id.*[3]

In the decision for which petitioner seeks review, the Court of Appeals held that the *North Carolina* standard does not apply to its review of the ICC's bus preemption decisions.[4] The Court found the ICC's intrastate rail authority reviewed in *North Carolina* to be "considerably different" from the Commission's intrastate bus jurisdiction. Whereas the ICC's rail authority was "limited," exercisable only if the ICC found "unjust discrimination" after investigation and "full hearing," the ICC's bus authority permits "substantial preemption of State regulatory au-

---

[3]In response to this argument, the NARUC anticipates that respondents will argue that the *Shreveport* and *North Carolina* decisions are inapposite to the case at bar because they dealt with rail regulation or because they are outdated. Such arguments, if offered, are incorrect. In the *Shreveport* decision, the Supreme Court held that as a matter of *constitutional* law, Congress possessed the power under the Commerce Clause (Art. I, sec. 8, cl. 3, U.S. Const.) to adjust intrastate rail rates to remedy unreasonable interstate commerce. Since 49 U.S.C. § 11501(e) directs the ICC to base its inquiry into intrastate bus matters upon the very same "undue burden" principle, it is clear that Congress has extended the *Shreveport* doctrine to intrastate bus regulation. Therefore, *Shreveport* and its progeny, including *North Carolina*, are fully applicable to this case.

[4]App. A. to Pet. for Cert. at 13a-14a.

thority" to "eliminate . . . burdens on interstate commerce."[5]

The NARUC respectfully submits that by this holding, the Court of Appeals erred. Although there are differences in the statutory procedures applicable to rail and bus preemption, the substantive findings required of the ICC are the same: before it may preempt intrastate bus fare decisions, the ICC must find that the intrastate fare "causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce,"[6] the basic *Shreveport* language construed in *North Carolina.* 325 U.S. at 511. Moreover, the reasons offered by the Court of Appeals for Congressional concern in the bus area (subsidization of intrastate fares by higher interstate charges) reflect precisely the same concern discussed by the Court in *North Carolina.* 325 U.S. at 511, 514-515, citing *Florida v. United States,* 292 U.S. 1 (1934) (intrastate traffic must produce its "fair share" of carrier revenue needs). Because of this similarity between bus and rail preemption, there is no persuasive reason why the *North Carolina* standard should not apply to ICC bus decisions under 49 U.S.C. §11501(e).

Therefore, the NARUC respectfully requests that this Court grant the Petition for Certiorari and state explicitly what is now implicit: that the *North Carolina* standard (which this Court never abandoned in the pre-Staggers rail era)[7] is fully applicable to ICC decisions preempting State intrastate bus fare determinations. Unless this Court finds that the ICC must meet a high standard of certainty when it preempts the State ratemaking function, the jurisdiction

---

[5] *Id.*

[6] 49 U.S.C. § 11501(e)(1)(B).

[7] *Public Service Commission v. United States,* 356 U.S. 421 (1958).

of each State agency will be diminished as the respective Courts of Appeals uphold Commission decisions under the deferential standards of the Administrative Procedures Act, 5 U.S.C. §706 (1977). As Appendix F to the Petition for Certiorari documents, the ICC has embarked upon a concerted effort to reverse intrastate fare decisions on a grand scale. Unless this Court reaffirms the basic principle of *North Carolina,* this preemption will likely continue.

CONCLUSION

In its *North Carolina* decision, this Court stated that "[i]ntrastate transportation is primarily the concern of the State." 325 U.S. at 511. We respectfully request that the Court grant the Petition for Certiorari and reaffirm the *North Carolina* principle of federalism that ICC decisions interfering with this State concern must be rigorously reviewed to ensure that the use of preemptive federal power is justified.

Respectfully submitted,

*WILLIAM PAUL RODGERS, JR.
General Counsel

CHARLES D. GRAY
Assistant General Counsel

GENEVIEVE MORRELLI
Deputy Assistant General Counsel

National Association of Regulatory
Utility Commissioners
1102 ICC Building
Post Office Box 684
Washington, D.C. 20044
(202) 628-7324
Counsel for Amicus Curiae

Dated: March 15, 1985

(*Counsel of Record)

Office-Supreme Court, U.S.
FILED
MAR 22 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1135

In the Supreme Court of the United States

OCTOBER TERM, 1984

COMMISSIONER OF TRANSPORTATION OF THE STATE OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
Acting General Counsel

ELLEN D. HANSON
Associate General Counsel

EVELYN G. KITAY
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

QUESTION PRESENTED

Whether the Interstate Commerce Commission's decision permitting Greyhound to increase its intrastate bus rates in New York was authorized by the Bus Regulatory Reform Act of 1982.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 8

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Atchison, T. & S. Ry. v. *Wichita Board of Trade,* 412 U.S. 800 10

Chicago, M., St. P. & P. R.R. v. *Illinois,* 355 U.S. 300 8

FEC v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27 10

Florida v. *United States,* 282 U.S. 194 8

Greyhound Lines, Inc., for Review of a Decision of the West Virginia Public Service Commission Pursuant to 49 U.S.C. 11501, In re, 133 M.C.C. 382, aff'd *sub nom. Public Service Commission of West Virginia* v. *ICC,* 749 F.2d 32 ..... 4, 12

Kentucky Utilities Co. v. *ICC,* 721 F.2d 537 9

North Carolina v. *United States,* 325 U.S. 507 ..... 6, 8, 9

Public Service Comm'n v. *United States,* 356 U.S. 421 ..... 8, 12

Page

Cases—Continued:

Texas v. *United States*, 730 F.2d 339, cert. denied, No. 83-2102 (Oct. 9, 1984) 9

Utah Power & Light Co. v. *ICC*, 747 F.2d 721 9

Virginia Stage Lines, In re, No. MC-59238 (Sub. No. 74), (Mar. 23, 1984), aff'd, *sub nom. Auville* v. *ICC*, 747 F.2d 179 11

Wheeling-Pittsburgh Steel Corp. v. *ICC*, 723 F.2d 346 9

Statutes and regulations:

Bus Regulatory Reform Act of 1982:

49 U.S.C. 10101(a)(3) 10

49 U.S.C. 10935 11

49 U.S.C. 11501 ..... 3, 10

49 U.S.C. 11501(e) 2, 3, 9, 10, 11

49 U.S.C. 11501(e)(1)(A) 3

49 U.S.C. 11501(e)(1)(B) 3, 10

49 U.S.C. 11501(e)(2)(A) 6

49 U.S.C. 11501(e)(2)(A)(i) 3, 5, 10

49 U.S.C. 11501(e)(2)(B) 6

49 U.S.C. 11501(f) 3, 10

49 U.S.C. 11501 note (§ 17(d)) 10

Interstate Commerce Act § 13(4), 49 U.S.C. (1976 ed.) 13(4) 8

Page

Statutes and regulations—Continued:

Staggers Rail Act of 1980, § 214(a)-(c)(1), 49 U.S. 11501(b)-(d) 8, 9

Transportation Act of 1958, Pub. L. No. 85-625, 72 Stat. 568 *et seq.* 8

5 U.S.C. 706 6

5 U.S.C. 706(2)(A) 10

Miscellaneous:

H. R. Conf. Rep. 97-780, 97th Cong., 2d Sess. 52 (1982) 2

H. R. Rep. 97-334, 97th Cong., 1st Sess. (1981) 2

S. Rep. 1647, 84th Cong., 2d Sess. (1958) 8

S. Rep. 97-411, 97th Cong., 2d Sess. (1982) 2, 7

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1135

COMMISSIONER OF TRANSPORTATION OF THE STATE OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 750 F.2d 163. The decisions of the Interstate Commerce Commission (Pet. App. 18a-25a) and the New York Department of Transportation (Pet. App. 26a-39a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 40a) was entered on September 18, 1984. Justice Marshall extended the date for filing a petition for a writ of certiorari to and including January 14, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Bus Regulatory Reform Act of 1982 (Bus Act), 49 U.S.C. 11501(e), Congress authorized the Interstate Commerce Commission to preempt state regulation of certain intrastate rate proposals of interstate bus carriers.[1] Congress was concerned that state regulation had contributed to the inadequate performance of the bus industry in recent years. S. Rep. 97-411, 97th Cong., 2d Sess. 7-8 (1982); H. R. Rep. 97-334, 97th Cong., lst Sess. 24 (1981). Congress noted that "a large number of * * * intrastate routes * * * are cross-subsidized by more profitable interstate routes and charter operations" and that "the carrier who must cross-subsidize its intrastate route is unfairly charging its interstate travelers an inequitable price." H.R. Rep. 97-334, *supra*, at 25; see *id.* at 44; S. Rep. 97-411, *supra*, at 8-11. Congress also observed (*id.* at 7-8):

> State regulatory restrictions on entry, exit, and/or service frequency, and slow action by State regulatory commissions on fare increases, often have significant adverse impacts on intercity bus operations. Thus, these actions impose an unreasonable burden on interstate commerce and must be preempted.

Accordingly, 49 U.S.C. 11501(e) was enacted to "create[] a mechanism to remedy situations where State actions are creating an unreasonable burden on interstate commerce." H.R. Conf. Rep. 97-780, 97th Cong., 2d Sess. 52 (1982). See also S. Rep. 97-411, *supra*, at 5, 28. That provision limits state authority to review the intrastate rate proposals of

---

[1]States retain full authority over the rates of bus carriers owned or controlled by a state or local government and over the rates of solely intrastate carriers. Until the Bus Act was enacted, states had full authority to regulate the intrastate rates of interstate carriers as well. See Pet. 6.

interstate carriers to a 120-day period. The ICC obtains jurisdiction:

> if * * * the request has been denied (in whole or in part) or the State authority has not acted finally (in whole or in part) on the request by the 120th day after the carrier made the request * * *.

49 U.S.C. 11501(e)(1)(A). Once the Commission has jurisdiction, it "shall" prescribe a rate, rule, or practice if it finds that the one in effect "causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce." 49 U.S.C. 11501(e)(1)(B). Action taken under 49 U.S.C. 11501 "supersedes State law or action taken under State law in conflict with the action of the Commission." 49 U.S.C. 11501(f).

The provision directly at issue in this case, 49 U.S.C. 11501(e)(2)(A)(i), further provides that the ICC shall presume a burdening of interstate commerce where the intrastate fare is lower than an interstate fare for comparable services.[2] This presumption is, however, rebuttable. Thus, once the carrier establishes that its intrastate fares are lower than its interstate fares for comparable transportation,[3] the

---

[2]References to the Section 11501(e) presumption herein mean only the presumption that arises where the intrastate fares are lower than the fares for comparable interstate services, since that is the only presumption involved in this case. Section 11501(e) provides similar rebuttable presumptions where: (1) the carrier's revenues from the intrastate fares are less than the variable costs of providing the service, (2) the state agency fails to act on the intrastate fare request by the 120th day, or (3) the most recent intrastate general fare increase is less than the most recent general fare increase applicable to interstate traffic. See Pet. App. 8a-12a.

[3]Transportation may be "comparable" for purposes of the presumption not only when it involves an interstate trip of similar length to the intrastate one whose fare is at issue, but also—as here— when both trips are between the same points within the state, and the passenger who purchases the service as part of an interstate trip is charged a higher fare

burden shifts to the state or other objecting party to show that the rate disparity is justified. An objector may rebut the statutory presumption by demonstrating differences in operating conditions, services, or costs between the inter- and intrastate operations sufficient to justify the rate disparity. *E.g.*, Pet. App. 24a; *In re Greyhound Lines, Inc., for Review of a Decision of the West Virginia Public Service Commission Pursuant to 49 U.S.C. 11501,* 133 M.C.C. 382 (1984), aff'd *sub nom. Public Service Commission of West Virginia* v. *ICC,* 749 F.2d 32 (4th Cir. 1984).

2. This case involves the May 1983 application of Greyhound Lines, Inc. (Greyhound) to the New York Department of Transportation (NYDOT) for authority to increase its New York intrastate passenger fares. NYDOT suspended the proposed increase and conducted a hearing. At the hearing, Greyhound produced unrebutted evidence (see Pet. 8) that even with the full increase requested, intrastate fares would be below the rate for interstate fares for transportation between the same points.[4] Despite the rate disparity, an Administrative Law Judge denied the increase,

---

than the passenger, travelling on the same bus between the same points, who purchases a ticket for a purely intrastate trip. See Pet. App. 15a; note 6, *infra.*

[4]As requested by NYDOT, Greyhound also produced various financial exhibits and earnings projections based on so-called "operating ratios." An "operating ratio" is a carrier's operating expenses expressed as a percentage of its revenues (Pet. 7 n.1; Pet. App. 3a). Greyhound's evidence showed that its national bus operations and its New York intrastate bus operations were currently losing money and that its New York interstate passenger services "were profitable and effectively subsidizing its unprofitable intrastate operations" (Pet. App. 4a). However, Greyhound's projected intrastate operating ratio, when adjusted for recent fare increases, showed that Greyhound's New York intrastate operations could become profitable—though still less so than its interstate operations in that state—in the coming year. See Pet. App. 3a-4a.

essentially because, as measured by operating ratios (see note 4, *supra*), "Greyhound's present operations within this State are profitable" (Pet. App. 35a).

Greyhound appealed the NYDOT decision to the ICC. The carrier invoked the statutory presumption, thus shifting the burden of proof to NYDOT to demonstrate that the rate disparity between comparable inter- and intrastate service in New York does not burden interstate commerce. In an attempt to meet its burden, NYDOT contended that (1) the operating ratio for Greyhound's intrastate operations is reasonable; (2) Greyhound has received subsidies (and significant recent fare increases) in New York State; and (3) Greyhound has been able to discontinue unprofitable operations in New York with minimal regulatory interference from NYDOT. See Pet. App. 21a-22a. Greyhound offered evidence in reply (Pet. App. 5a, 21a, 22a-23a).

3. After full consideration of the NYDOT record and the pleadings filed with the ICC, the Commission found that NYDOT's denial had resulted in intrastate rates that cause unreasonable discrimination against, and impose an unreasonable burden on, interstate commerce; consequently, the federal agency approved the increase (Pet. App. 18a-25a). The Commission applied the rebuttable presumption of Section 11501(e)(2)(A)(i), since it was undisputed that the intrastate passenger fares are (and will remain) lower than the fares for comparable interstate service (Pet. App. 24a). Because the record "does not document any differences in operating conditions or cost of service sufficient to justify this disparity" (*ibid.*), the State had failed to rebut that presumption. Consistently with past cases decided by the agency under the Bus Act (see Pet. App. 22a-23a, 42a-43a), the Commission found NYDOT's claim that Greyhound's intrastate operating ratio was reasonable was "not on point" (Pet. App. 24a). The Commission also concluded that the subsidy did not warrant denial

of the increase because it was not necessarily permanent, and—even with the subsidy included—Greyhound's intrastate fares in New York would still be lower than their interstate counterparts (*ibid.*).

4. On a petition for review, the court of appeals upheld the Commission's determination in all respects (Pet. App. 1a-17a). The court first found that the existence of a rate disparity, without more, is sufficient to invoke the statutory presumption provision (Pet. App. 6a-12a, 17a).[5] The court then rejected New York's argument, based on *North Carolina* v. *United States*, 325 U.S. 507 (1945), that the ICC's decisions to preempt the state authority must meet a "high standard of certainty." The court found that the rigid requirements of *North Carolina* do not apply to ICC decisions made under the Bus Act, in which Congress made a decision to allow substantial preemption of state authority. In view of the broad and explicit preemption authority involved, the court stated, review of these agency decisions is governed by the narrow "arbitrary [or] capricious" test in 5 U.S.C. 706. Pet. App. 13a-14a.

Turning to New York's attempts to rebut the presumption, the court found NYDOT's reliance on operating ratios misplaced, explaining that the computation of such ratios necessarily involves a number of "highly arbitrary accounting assumptions" used to allocate revenues and expenses between intra- and interstate operations (Pet. App. 15a). The court observed that allocations are necessary because a

---

[5]The court rejected petitioner's argument that before invoking this presumption the ICC must find the existence of both one of the three criteria listed in subsection (A) of 49 U.S.C. 1150l(e)(2) and the criterion in subsection B. Petitioner does not challenge this holding here (Pet. 9 n. 2).

given bus typically contains both inter- and intrastate passengers.[6] Furthermore, it noted that the normal method for allocating expenses between inter-and intrastate operations is on the basis of passenger miles.[7] "The major problem with this method," however, is that many costs (such as ticketing, baggage handling and other station expenses) simply do not vary proportionately with the length of the trip (*ibid.*). Consequently, as the court pointed out, the actual cost per mile of shorter trips is typically significantly higher than that of longer ones. In short, operating ratios are "unreliable and insufficient to rebut Section 11501(e)(2)'s presumption" because intrastate trips are typically shorter than interstate trips and "the expenses allocated to the former are necessarily underestimated by an accounting method which assigns expenses on the basis of passenger miles." Pet. App. 15a-16a.

The court also rejected New York's argument that because it had allowed Greyhound to eliminate unprofitable routes with "minimal" difficulty and because Greyhound had "monopoly power" over certain areas of the state, the disparity between inter- and intrastate rates does not burden interstate commerce (Pet. App. 16a). Finally, the court found reasonable the Commission's conclusion that the possibility of a continuing subsidy was not sufficient to justify the existing rate disparity in this case (Pet. App. 17a).

---

[6]Intrastate passengers include all persons whose passage does not take them across state lines. Thus, a person remains an intrastate passenger even though the bus on which he rides crosses state lines. See Pet. App. 3a n.1; S. Rep. 97-411, *supra*, at 7.

[7]A passenger mile is one mile travelled by one passenger. Thus ten passengers each travelling ten miles together would have travelled one hundred passenger miles (Pet. App. 15a n.6).

ARGUMENT

The thorough opinion of the court of appeals, upon which we rely, correctly affirmed the Interstate Commerce Commission's interpretation of its responsibilities in administering the Bus Act. The holding does not conflict with any decision of this Court or any other court of appeals. This case therefore presents no issue of general importance warranting this Court's review.

1. Petitioner principally argues (Pet. 10, 13-16) that the court below should have applied stricter judicial scrutiny, as called for by four decisions of this Court relating to ICC preemption of state *rail* ratemaking decisions.[8] But even assuming the current validity of those cases, the premise of petitioner's argument rests on equating the agency's current authority over intrastate bus rates with its authority over intrastate rail rates. In fact, however, subsequent amendments to the Interstate Commerce Act cast considerable doubt on the current validity of those cases even in the context in which they arose. The cited cases were decided between 1931 and 1958, and interpret former Section 13(4) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 13(4). Congress amended that statute to strengthen the ICC's hand in exercising jurisdiction over intrastate rail rates in the Transportation Act of 1958, Pub. L. No. 85-625, 72 Stat. 568 *et seq.* See, *e.g.*, S. Rep. 1647, 84th Cong., 2d Sess. 19-21 (1958). Then Section 214(a)-(c)(1) of the Staggers Rail Act of 1980, 49 U.S.C. 11501(b)-(d), vested the ICC with still more expansive preemptive authority over intrastate rail rates. Recognizing the effect of these statutory changes, several lower courts have found that the decisions

---

[8] *North Carolina* v. *United States, supra; Public Service Comm'n* v. *United States*, 356 U.S. 421 (1958); *Chicago, M., St. P. & P. R.R.* v. *Illinois*, 355 U.S. 300 (1958); and *Florida* v. *United States*, 282 U.S. 194 (1931).

petitioner relies on are no longer controlling, even in rail ratemaking cases. See *Utah Power & Light Co.* v. *ICC*, 747 F.2d 721, 736 (D.C. Cir. 1984); *Texas* v. *United States*, 730 F.2d 339 (5th Cir. 1984), cert. denied, No. 83-2102 (Oct. 9, 1984); *Kentucky Utilities Co.* v. *ICC*, 721 F.2d 537, 542-543 (6th Cir. 1983); cf. *Wheeling-Pittsburgh Steel Corp.* v. *ICC*, 723 F.2d 346, 353 (3d Cir. 1983).

In any event, as petitioner itself concedes (Pet. 6, 16), the current intrastate rate provisions applicable to bus carriers are not the same as the comparable provisions applicable to rail carriers. Those differences are significant in this context. The burden is on the rail carrier to demonstrate that the State applied inappropriate standards in setting intrastate rail rates (49 U.S.C. 11501(c)). The Bus Act, by contrast, puts the burden of proof on the party objecting to the increase to justify a demonstrated disparity between inter- and intrastate fares. And the various presumptions in the Bus Act that, where applicable and unrebutted, direct a finding that interstate commerce is unreasonably burdened provide ample evidence of Congress's intent in the Bus Act to "allow substantial preemption of state regulatory authority" (Pet. App. 13a).

Accordingly, the cited decisions, reflecting an era when the regulation of intrastate rail transportation was "primarily the concern of the state"[9] and the ICC had *no* jurisdiction over intrastate bus fares (see Pet. 6), are not controlling. Petitioner's attempt to create a conflict with decisions of this Court, where none exists, should thus be rejected, as it was by the court below. The correct standard of judicial review to be applied to the Commission's decisions under Section 11501(e) is, as the court below stated (Pet. App. 14a), the deferential "arbitrary [and] capricious" standard

---

[9] *North Carolina* v. *United States*, 325 U.S. at 511.

set forth in 5 U.S.C. 706(2)(A). See *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981); *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 806 (1973) (generally, judicial review of Commission rate cases is highly deferential).

2. Petitioner argues (Pet. 16) that under the Bus Act primary authority for setting intrastate rates remains with the states. Petitioner implies that even if the ICC disagreed with the state agency's rationale, it should not have upset NYDOT's decision so long as the state provided "some evidence" to rebut the statutory presumption. This argument, however, fundamentally misapprehends the legislative scheme. Nothing in the language of Section 11501(e) or the legislative history requires the ICC to defer to a state's determination. On the contrary, the Act reflects Congress's clear intent that intrastate services not be regulated differently from interstate services,[10] and that the ICC be permitted to preempt state actions it finds to be duplicative, wasteful or short-sighted. As discussed above, Congress expressly left it to the ICC to determine both when an intrastate rate constitutes an "unreasonable burden on interstate or foreign commerce" and when the statutory presumption in Section 11501(e)(2)(A)(i) has been rebutted. 49 U.S.C. 11501(e)(1)(B) and (2)(A)(i). Moreover, it provided that an action of the Commission taken under Section 11501 "supersedes State law or action taken under State law in conflict with the action of the Commission." 49 U.S.C. 11501(f). Clearly, there was no requirement that the ICC

---

[10]In 49 U.S.C. 10101(a)(3), Congress directed the Commission to ensure that federal reforms are not nullified by state regulatory action. And in Section 17(d) of the Bus Act (49 U.S.C. 11501 note) (which was not codified) Congress expressly directed each state to revise its standards for intrastate bus rates, rules and practices to conform to federal standards.

accept NYDOT's arguments, which it found to be contrary to both the terms of the statute and the legislative intent.[11]

3. There similarly is no basis for petitioner's bald assertion (Pet. 11, 12, 18) that the ICC is improperly preempting state authority by increasing all intrastate fares which are lower than interstate fares without regard to the circumstances. The Commission fully recognizes that the statutory presumption is rebuttable and specifically found that NYDOT had failed to justify the disparity in these particular inter- and intrastate fares (Pet. App. 24a). Petitioner does not (and cannot) point to any language in this case, or others decided under Section 11501(e), implying that inter- and intrastate fares must *always* be equalized.[12]

In the final analysis, petitioner's argument is little more than an invitation to this Court to reweigh its rebuttal evidence. See Pet. 17. However, the Commission's position (Pet. App. 24a) that operating ratios are not probative is reasonable (see Pet. App. 15a-16a and pages 6-7, *supra*), and completely consistent with the Commission's approach in other cases decided (both before and after this case)

---

[11]Congress could have provided that the ICC "consider" or even "give great weight" to the state's decision, but it did not. The absence of any such statutory requirement belies petitioner's argument that the ICC should defer to the state.

[12]Petitioner's assertion ignores the fact that only the Commission's decision in this case is properly before the Court. In any event, petitioner has grossly oversimplified the differing factual and legal circumstances underlying the decisions it relies upon. For example, *In re Virginia Stage Lines*, No. MC-59238 (Sub. No. 74) (Mar. 23, 1984), aff'd *sub nom. Auville* v. *ICC*, 747 F.2d 179 (4th Cir. 1984) (see Pet. 12) involved a petition to discontinue bus service under a statute (49 U.S.C. 10935) that is not at issue in this case. How the Commission allocates avoidable (*i.e.*, marginal) costs in such cases clearly is irrelevant to the rates matter before the Court.

under the Bus Act.[13] See *In re Greyhound Lines, Inc., for Review of a Decision of the West Virginia Public Service Commission Pursuant to 49 U.S.C. 11501, supra*; Pet. 11. The proper way to rebut the presumption, as the Commission explained (Pet. App. 24a), is to point to distinguishing features in operating conditions, services, or costs that would account for the rate disparity. The only evidence presented by NYDOT that is relevant to these factors is New York's subsidy to Greyhound. In this case, however, the subsidy was too limited and temporary to justify denying Greyhound the opportunity to bring its intrastate fares toward interstate levels (see Pet. App. 17a, 24a).

In sum, the Commission's decision that New York did not meet its burden of rebuttal was well within its broad discretion under the statute and is consistent with the intent of Section 11501 and Commission practice in other cases. Accordingly, the court of appeals' decision affirming the Commission's determination does not present questions of broad importance that warrant review by this Court.

---

[13]Even in the railroad industry, operating ratio evidence long has been regarded as suspect because of the difficulties in allocating expenses between operations. See generally the dissent in *Public Service Comm'n* v. *United States*, 356 U.S. at 429-463 (Frankfurter, J.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

ROBERT S. BURK
Acting General Counsel

ELLEN D. HANSON
Associate General Counsel

EVELYN G. KITAY
Attorney
Interstate Commerce Commission

MARCH 1985

DOJ-1985-03

Supreme Court, U.S.
FILED
APR 8 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE COMMISSIONER OF TRANSPORTATION OF THE STATE OF NEW YORK,
Petitioner,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

ROBERT ABRAMS
Attorney General of the State of New York
ROBERT HERMANN*
Solicitor General
PETER H. SCHIFF
Deputy Solicitor General
The Capitol
Albany, N.Y. 12224
(518) 474-8101

BRYCE REA, JR.
DONALD E. CROSS
LEO C. FRANEY
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 785-3700

Counsel for Petitioner
**Counsel of Record*

Of Counsel:

REA, CROSS & AUCHINCLOSS
Suite 700
One Thomas Circle, N.W.
Washington, D.C. 20005

April 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY ARGUMENT 1

CONCLUSION 5

TABLE OF AUTHORITIES

CASES: Page

Houston, E. & W. T. Ry. v. United States, 234 U.S. 342 (1914) 3

Kentucky Utilities Co. v. I.C.C., 721 F.2d 537 (6th Cir. 1983) 1, 2

North Carolina v. United States, 325 U.S. 507 (1945) . 1, 2, 3

State of Texas v. United States, 730 F.2d 339, cert. denied, No. 83-2102 (Oct. 9, 1984) 2, 3

Utah Power & Light Co. v. I.C.C., 747 F.2d 721 (D.C. Cir. 1984) 1

Wheeling-Pittsburgh Steel Corp. v. I.C.C., 723 F.2d 346 (3rd Cir. 1983) 2

STATUTES:

49 U.S.C. § 11501(b)-(d) 1-2

49 U.S.C. § 11501(b)(6) 2

49 U.S.C. § 11501(c) 2

49 U.S.C. § 11501(e) 3

49 U.S.C. § 11501(e)(1)(B) 3

49 U.S.C. § 11501(e)(2)(A) 3

49 U.S.C. § 11501(e)(2)(A)(i) 4

49 U.S.C. § 11501(e)(2)(B) 3

MISCELLANEOUS:

H.R. Conf. Rep. No. 97-780, 97th Cong., 2d Sess. (1982). 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1135

THE COMMISSIONER OF TRANSPORTATION OF THE STATE OF NEW YORK,
Petitioner,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF OF PETITIONER

This Court's opinion in *North Carolina* v. *U.S.*, 325 U.S. 507 (1945), requires ICC decisions preempting state regulation of intrastate rates to meet a high degree of certainty. In an effort to avoid this standard respondents rely upon recent cases holding *North Carolina* standards to be inapplicable in the case of decisions preempting state regulation of intrastate *rail* rates under Section 214 of the Staggers Act.[1] 49 U.S.C.

---

[1] *Utah Power & Light Co.* v. *ICC*, 747 F.2d 721, 736 (D.C. Cir. 1984) and *Kentucky Utilities Co.* v. *ICC*, 721 F.2d 537, 542-543 (6th Cir. 1983). However, the Third Circuit has held that the

§ 11501(b)-(d). (Brief of Resp., 8-9). That reliance is misplaced.

The preemption authority conferred by the Staggers Act is decidedly broader than that conferred by the Bus Act. Indeed, as a practical matter, Section 214 of the Staggers Act eliminates independent state regulation of the intrastate rates of interstate rail carriers. Thus, it preempts *all* state jurisdiction over rail general rate increases, inflation-based rate increases, and fuel adjustment surcharges. 49 U.S.C. § 11501(b)(6). If a state wishes to continue regulating other types of rail intrastate rate adjustments it must do so exclusively in accord with federal law,[2] (*State of Texas* v. *U.S., supra,* page 347), and the ICC is empowered to review state rate decisions for compliance with federal law. *Kentucky Utilities Co.* v. *ICC, supra.* Where the state decision does not conform to federal law, the ICC "shall determine and authorize the [rail] carrier to establish the appropriate rate." 49 U.S.C. § 11501(c).

In contrast, the ICC's role under the Bus Act is very limited. Fundamentally, the states are to con-

---

Staggers Act does not change the *North Carolina* standards. *Wheeling-Pittsburgh Steel Corp.* v. *ICC,* 723 F.2d 346, 353 (3rd Cir. 1983). Although the 5th Circuit has not specifically addressed the question, its decision in *State of Texas* v. *U.S.,* 730 F.2d 339 (1984) aligns its views with those of the D.C. and 6th Circuits.

[2] Respondents attempt to create the impression that in Section 17 of the Bus Act Congress imposed federal bus rate regulatory standards on the states. Brief of Resp. 10, fn. 10. This is not so. Congress did no more than *urge* the states to establish among themselves uniform bus rate regulatory standards which are "consistent" with standards established by the ICC. H.R. Conf. Rep., 53. However, the states cannot yet do so because the ICC has established no such standards.

tinue to regulate intrastate bus rates under state law and state regulatory standards.[3] The ICC can preempt state authority only if a state denies a bus rate increase or fails to act on one in 120 days *and* the ICC finds that the bus rate in effect "causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce." (49 U.S.C. § 11501(e)(1)(B)). This is the same finding this Court required in its 1914 decision in the *Shreveport* Case[4] and the Congress requires it in the Bus Act in precisely the same statutory language as was before this Court in the *North Carolina* Case. See *State of Texas* v. *U.S., supra,* at pages 345-346.

Respondents' erroneous view of the breadth of the federal preemption of state authority worked by Section 17 of the Bus Act leads them to the wrong construction of the Act's rebuttable presumptions. 49 U.S.C. § 11501(e)(2)(A) and (B). According to respondents, the Bus Act ". . . reflects Congress' clear intent that intrastate service not be regulated differently from interstate service." Brief of Resp., 10. From this false premise, respondents conclude that the ICC can require intrastate rates to be raised to the level of interstate rates unless the state can demonstrate differences in operating conditions, services, or costs between interstate and intrastate service. Brief of Resp., 4, 5, 9, 11, 12.

Respondents' construction flies in the face of the language of Section 11501(e) and its legislative his-

---

[3] H.R. Conf. Rep. 97-780, 97th Cong., 2d Sess. (1982), 52 (hereafter called H.R. Conf. Rep.).

[4] *Houston, E. & W. T. Ry.* v. *U.S.*, 234 U.S. 342 (1914).

tory. States are free to contest federal preemption on the grounds "... that the State action was reasonable". H.R. Conf. Rep. 52. The fact that intrastate bus rates are lower than interstate rates merely creates a rebuttable presumption that the lower state rate imposes an unreasonable burden on interstate commerce. 49 U.S.C. § 11501(e)(2)(A)(i). If the right of state to contest federal preemption is to have any meaning at all, it is entitled to rebut that presumption by demonstrating that its action was reasonable, i.e., that its lower intrastate rate does *not* impose an unreasonable burden on interstate commerce. To say otherwise is to convert a rebuttable presumption into an irrebuttable presumption, in flat disregard of the intent of Congress.

Finally, respondents have failed conspicuously to address petitioner's question dealing with the requirement in bus rate preemption cases for an ICC finding respecting the minimum level of intrastate rates necessary to remove any unreasonable discrimination against or burden on interstate commerce. Their silence on this question reflects their erroneous view that the Bus Act contemplates equal intrastate and interstate bus rates—a result never intended by Congress.

CONCLUSION

Wherefore, Petitioner requests that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York

ROBERT HERMANN*
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General
The Capitol
Albany, N.Y. 12224
(518) 474-8101

BRYCE REA, JR.
DONALD E. CROSS
LEO C. FRANEY
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 785-3700

Counsel for Petitioner

**Counsel of Record*

Of Counsel:

REA, CROSS & AUCHINCLOSS
Suite 700
One Thomas Circle, N.W.
Washington, D.C. 20005

April 1985